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AND
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CONVEYANCER'S NOTEBOOK.

Owing to a recent order of the Paper Controller alterations have had to be made in the form of this magazine. It will be observed that the type has become closer and the lines of type on a page have become longer, thus enabling more matter to be got into one page. By adopting these methods it is hoped that despite the very severe restrictions imposed it will be possible to provide subscribers with not less matter than last year, though, of course, the actual number of pages will be less. The bulk of matter that is permitted bears relation to the year immediately preceding the war and it happens that in that year we were able to provide subscribers with a larger issue than had been intended when the new style was adopted six years ago. We need hardly say that the fidelity of early subscribers in maintaining their subscriptions when the change was made, together with new subscribers in the first three years of our new life, made this " bumper crop " possible. We are glad to be able to repay them with being able to keep up at least a very substantial proportion of the peace-time size. This is perhaps an appropriate moment at which the Editors and Publishers should express their appreciation and sense of encouragement derived from the continued support of subscribers despite the difficulties of the present times. The Editors would welcome any suggestions from subscribers by which they think the utility of the work could be improved. It may not be, indeed it is not, possible to do all that could be wished, but every suggestion will be gratefully received and very seriously considered.

Estate duty—Settled Land Act.—We have received the following letter from a correspondent:—

" We think it well to call the attention of practitioners generally, and more particularly practitioners who deal with settled landed estates, to a change of practice recently made in the Estate Duty Office.

" For many years it has been the practice of the Estate Duty Office to treat capital moneys held by Settled Land Act trustees and representing proceeds of sale of realty subject to a strict settlement, as realty on the

death of a tenant for life. The obvious advantage of course of such treatment (and rightly or wrongly) was that interest on the estate duty payable in respect of the capital moneys did not begin to run until the first anniversary of the death of the tenant for life.

"The view held by the Estate Duty Office was supported by Mr. Green in his excellent book on Death Duties, p. 20, second paragraph, and the case of *In the goods of Lloyd* (1884) 9 P. D. 65, 20 Digest 375, 1126, therein referred to; moreover see *Snell's Equity* (20th ed.), p. 185, and *Fletcher* v. *Ashburner*, I. L. C. 989.

"In a recent case of a settled estate with which we are concerned we have been informed by the Estate Duty Office that although the view as expressed by Mr. Green did represent the view formerly accepted by the Office for death duty purposes, the Office has recently been advised that such view was untenable where capital moneys under the Settled Land Acts were concerned. The official reasons are too lengthy to deal with in this letter but briefly the chief reason is that as there is no *imperative* requirement that capital moneys shall be invested in real estate, the capital moneys must, for the purpose of death duties, be treated as personalty, with the result that interest is payable on the estate duty from the date of death.

"In these days, when interest on estate duty is equivalent to 6 per cent. gross, the effect of the change of official opinion will be readily appreciated by practitioners."

We confess to some surprise at this change of view. Capital moneys must "for all purposes of disposition, transmission and devolution be treated as land": Settled Land Act, 1925, s. 75 (5). In *Re Cartwright*, [1939] Ch. 90, it was held that capital moneys could not be treated as personalty for the purposes of the Wills Act, 1861, because of the provisions of the Settled Land Act requiring the capital moneys to devolve as land. It, therefore, does seem a little strange that though Parliament has directed that capital moneys should for virtually all practical purposes be treated as land it should then be held that for the purposes of taxation the property should devolve as if it were personalty.

War damage appeals.—Rules have now been issued for War Damage appeals. An appeal or notice of reference must be made within twenty-eight days of the determination by the Commission and substantially in the form given in the schedule to the rules. The rules (S. R. & O., 1942/925) are fairly extensive and set out in full in the *Law Society's Gazette* for July, 1942. Practitioners will be well advised to acquaint themselves with the contents and particularly should bear in mind that the time for appeal or notice of reference is not unduly long.

Valuation under the Coal Act—new rules.—The Coal (Valuation Procedure) Rules, 1942 (S. R. & O., 1942/1108), make further provision and

amendments to the Coal (Valuation Procedure) Rules, 1941. These rules are set out in full in the *Law Society's Gazette* for July, 1942, and a word of praise may be here in point for the full accounts given in this gazette of this ephemeral legislation by order that is not readily accessible to the profession. Indeed, the way of the practitioner with depleted staff is hard in these days of "stacks and loads" (as Maitland said in another connection) of rules and orders when it is difficult even to keep track of their existence.

Defence Regulations—taking water—taking fixtures.—Under amendments of the Defence Regulations (S. R. & O., 1942/961) a competent authority has power for any purpose connected with the defence of the realm, etc., to take water from any natural or artificial source of supply. Compensation for infringement of the rights of landowners in connection with rights of water or watercourse are payable under the Compensation (Defence) Act, 1939. The regulation is regulation 50A.

Under regulation 50B a competent authority can sever fixtures for the purpose of the efficient prosecution of the war or for maintaining supplies or services essential to the life of the community. Such severance relieves of liability any person under any obligation in a lease or otherwise. Compensation is not payable under the Compensation (Defence) Act, 1939, but is based on the price which might have been obtained immediately prior to severance on a sale to a purchaser intending to sever the fixture. There is also provision for compensation to persons having an interest in the land for expenditure reasonably necessary to make good the damage: see in detail S. R. & O., 1942/801. The Compensation (Defence) Notice of Claims Rules, 1942 (S. R. & O., 1942/1849), are set out in full in the *Law Society's Gazette* for August. These rules deal with claims under regulation 50B and require the claim to be made in a specified form.

IMPLIED COVENANTS FOR TITLE.

By B. A. Bicknell, Barrister-at-Law.

The decision of the Court of Appeal in *Fay* v. *Miller, Wilkins & Co.*, 110 L. J. Ch. 124; [1941] Ch. 360, so far as it turns on the construction placed on section 76 of the Law of Property Act, 1925, is revolutionary and contrary to the general practice of conveyancers for the last fifty years. It requires, therefore, a more detailed consideration that it was possible to give to it when the decision was dealt with at the time in "Notes of Recent Cases" (*ante*, Vol. 6, p. 129).

The question arose in this way: The defendant auctioneers on the instructions of H. put up a freehold dwelling-house for sale. H. was in a position to sell the house as personal representative of A. The condition of sale provided that "the vendor will convey as legal personal

representative". At the auction the premises were knocked down to the plaintiff for £600 and the auctioneers signed a memorandum ratifying the sale which was expressed to be subject to the conditions of sale. The vendor refused to complete as she contended, and the learned Judge held rightly, that in error the property had been sold at less than the reserve price which she had fixed. The purchaser brought an action for specific performance and joined the auctioneers as defendants claiming against them in the alternative damages for breach of warranty of authority. Bennett, J., refused to award damages, holding that there was no sufficient memorandum of the contract to satisfy section 40 of the Law of Property Act, 1925, as the note of the contract contained nothing to identify the vendor.

The Court of Appeal reversed this decision, holding that the words "the vendor will convey as legal personal representative" were sufficient to lead the inquirer to the actual vendor. In so holding the Court was in effect merely approving a paragraph in *Fry on Specific Performance*, para. 331, p. 148. The decision so far as it rests on that ground is unimportant. It is the passages dealing with section 76 which are causing concern to conveyancers.

Before dealing with this part of the decision it is necessary to consider the actual wording of section 76 upon which the question turns. It provides: "(1) In a conveyance there shall . . . be deemed to be included, and there shall in those several cases, by virtue of this Act, be implied, a covenant to the effect in this section stated, by the person or by each person who conveys . . . that is to say: (A) In a conveyance for valuable consideration, other than a mortgage, a covenant by a person who conveys and is expressed to convey as beneficial owner in the terms set out in Part I of the Second Schedule to this Act." Subsequent paragraphs of the sub-section framed in similar terms provide for covenants to be implied in the case of a person who "conveys and is expressed to convey" as "settlor", "trustee", "mortgagee" or "personal representative".

The question is, whether the words "beneficial owner", "trustee", etc., relate back to the words "who conveys" as well as to the immediately preceding words "is expressed to convey". If the words "who conveys" mean merely "who purports or is expressed to convey" there are no difficulties. If the alternative construction is adopted, they are serious.

Sir Wilfrid Greene, M.R., in this connection said: "The words appear to me to mean, in the first place, that in the conveyance the vendor will convey, and will be expressed to convey, as personal representative of the deceased person so as to bring into effect the provisions of section 76 (1) (F) of the Law of Property Act, 1925, which limit the vendor's covenants for title. This necessarily means that at the date of the conveyance the vendor will be a person who can properly be described therein as the personal representative of a deceased person and that he will convey the property sold under that description and in that capacity.

"It was argued by Mr. Buckley that the language of special

condition 4 implied nothing more than that the vendor's covenants for title would be limited by reference to the covenants implied on a conveyance by a personal representative and was merely a convenient form of shorthand implying nothing as to the character of the grantor. I cannot accept this argument. There is a well-known conveyancing device for achieving the result which he suggests (see *Key & Elphinstone* (13th ed.), Vol. 1, p. 571, Precedent No. 8). Such a device is necessary because the limited statutory covenants for title are only imported when the grantor both conveys in the capacity of personal representative and is expressed to convey as such."

Clauson, L.J., said: "It was argued that the clause had reference only to the form of the conveyance and was not, nor was it intended to be, a description of the vendor, and that the clause merely stated that the vendor, whoever he was, would not give any covenants for title save those which would be implied under section 76 (1) (F) of the Law of Property Act, 1925, by his being expressed to convey as personal representative. It must, however, be borne in mind that the implication of covenants by a conveyance expressed in that form is effected only if the conveying party is not only expressed so to convey, but in fact does convey as personal representative."

The question to which Sir Wilfrid Greene, M.R., and Clauson, L.J., gave such a categorical answer was not, it seems, fully argued before them, and certainly the authorities on the matter were not cited. The question therefore arises whether this part of the decision in *Fay* v. *Miller, Wilkins & Co., supra*, is really a correct statement of the law.

It would seem that these observations were not strictly necessary to the decision. It is accordingly desirable to reconsider the position in the light of the text-books, the authorities and conveyancing practice with a view to seeing whether these observations are well founded.

In only two collections of precedents has this question been discussed. In *Davidson's Precedents and Forms in Conveyancing* (5th ed.), Vol. 1, p. 280, the matter was, it seems, raised in a note. *The Law Quarterly Review* (1888), Vol. 2, p. 511, in the review of this edition of *Davidson* deals with this note on the statutory covenants at length. The reviewer does not accept the suggestion that no covenants are implied if the conveying party does not possess the capacity in which he is expressed to convey, and ends the review in the following way: "If it is necessary that the person should actually convey as (say) beneficial owner, besides being expressed so to do, the 'beneficial owner' covenants will not arise in a case where the party has previously, from fraud or forgetfulness, granted away his whole estate, and has consequently nothing actually to convey; in fact, the statutory covenant will not arise in the very case where it is most wanted! We fear that people have yet to realise what 'simplification' has been introduced into our conveyancing."

The question is also dealt with in *Bythewood & Jarman's Precedents on Conveyancing* (4th ed.), Vol. 5, p. 224. In a note the writers, while not, it seems, accepting the view that for the statutory covenants to operate the covenantor must possess the character in which he is expressed to covenant, considered there was sufficient doubt as to the

position for them to suggest that, where beneficial owner covenants are required and the grantor is not a beneficial owner, it would be wise to set out the covenants in full. This note does not appear in the last edition of this work.

The difficulty does not seem to have occurred to any other of the principal masters of the conveyancing art. Neither E. P. Wolstenholme nor Sir Howard Elphinstone appear to have realised that there was any question here to be considered. In *Wolstenholme's Precedents in Conveyancing* (5th ed., 1891), p. 165, a tenant for life is expressed to convey as beneficial owner. A similar procedure is advocated in *Elphinstone's Introduction to Conveyancing*, 3rd ed., 1884, at p. 108; 7th ed., 1918, at p. 168. G. B. Hamilton in his *Treatise on the Law of Covenants* (2nd ed.), pp. 54 *et seq.*, also expressed the same opinion.

Where the point has been expressly considered a contrary view to that expressed by the Court of Appeal has been voiced. In *Hood & Challis's Conveyancing Acts* (2nd ed., 1884), p. 122, the following passage occurs: "It would seem that the use of the words 'as beneficial owner' will convey the covenants, even if the party purporting to convey is not in fact a beneficial owner nor does in fact convey anything, but only joins in the conveyance for the purpose of entering into the covenants." This passage is to be found in subsequent editions including the seventh edition, but not in the last, the eighth edition.

The *Encyclopedia of the Laws of England* (2nd ed., 1909), Vol. 14, p. 126, also contains a statement that "anyone may, whether he be in fact a beneficial owner or not, be expressed to convey as such for the purpose of giving by implication the ordinary covenants for title, and this course is often pursued".

When we turn to consider the judicial authorities, the matter has never been expressly decided, but there are three decisions in which it appears to have been assumed without question that the statutory covenants were implied by the use of the appropriate words, notwithstanding the fact that the covenantor did not in fact possess the capacity in which his is expressed to convey.

David v. *Sabin*, [1893] 1 Ch. 523, is the first of such decisions. In this case the defendant was tenant for life of property at Forest Hill. In 1885 he granted a lease of the settled land to B. for a term of ninety-nine years. B. subsequently executed three mortgages of the premises by sub-demise. In 1897 B., as beneficial owner and for valuable consideration, purported to surrender the term to the defendant, fraudulently concealing from him that he had executed three mortgages. Subsequently, the defendant under his Settled Land Act powers "as beneficial owner" conveyed part of the land to B. in fee simple. After an intermediate conveyance for value the premises were conveyed to the plaintiff. Subsequently, the existence of the mortgages was discovered and the plaintiff brought an action against the defendant for damages for breach of the statutory covenant implied by reason of his conveyance as "beneficial owner". The Court of Appeal, consisting of Lindley, Bowen and A. L. Smith, L.JJ., reversed the decision of Romer, J., as he then was, and held that the plaintiff was entitled to claim damages against

the defendant for breach of the covenant implied by his conveying as "beneficial owner". The interest of this decision in the present connection lies in the fact that these four Judges all assumed, apparently without any doubt whatever, that the only matter to be decided was as to the construction of the covenant to be implied from the defendant conveying as beneficial owner. Neither in the judgments nor in the argument is there any suggestion that as the vendor was merely a tenant for life he was not a beneficial owner and therefore no covenants at all might be implied. Lindley, L.J., said: "The defendant conveyed as beneficial owner; he did not expressly enter into any covenants for title, but the vendor's covenants for title set out in section 7 (1) of the Conveyancing Act, 1881, must by that Act be treated as contained in the conveyance."

In *Re Ray*, [1896] 1 Ch. 468, this matter again came indirectly before the Court of Appeal. A lunatic so found by inquisition was tenant for life in possession of certain lands and the question was raised whether section 124 of the Lunacy Act, 1890, which authorises his committee to execute assurances on his behalf, must be construed as giving the Court jurisdiction to authorise a committee, who is selling, not only to convey on his behalf but also to enter into the covenants usual and proper in such a conveyance including the ordinary covenants for title. The Court of Appeal held that the Court could authorise the committee to give such covenants. Kay, L.J., in this connection said: "It is rather difficult to say that a tenant for life under the Settled Land Act conveys the fee simple as 'beneficial owner'. That he may be expressed to convey as beneficial owner I can understand; but perhaps it is expedient to give to this clause of the Conveyancing Act a wide meaning, for its main object was no doubt to prevent the necessity of setting out all these covenants at length, so that when a person conveys as beneficial owner, and is expressed to convey as beneficial owner, these covenants should be implied. It is a sort of compendious mode of bringing these covenants into a conveyance where they are not set out at length. Moreover, a tenant for life has some beneficial interest because he has a life interest, and, therefore, a conveyance which passes the fee simple includes his life interest. I think it is possible to say, without straining the words, that a tenant for life may convey under the Settled Land Act, 1882, expressing himself to be conveying as beneficial owner for the purpose of introducing these covenants; and, when he does so, the covenants which I have referred to in the Conveyancing Act may be considered as contained in the conveyance."

In *Re Tyrell*, 82 L. T. 675, Cozens-Hardy, J., as he then was, had to consider the position where a tenant for life had sold part of the settled land in exercise of his statutory power and was expressed to convey as "beneficial owner". It was subsequently discovered that unknown to the vendor the property was subject to a reversionary lease granted by his predecessor in title. The learned Judge refused to order rescission of the conveyance and said: "He (the vendor) conveyed as 'beneficial owner' with the consequences described in the Conveyancing Act." It does not seem to have occurred to the learned Judge that as the tenant

for life was not the beneficial owner no covenants were implied and in fact the covenants were merely waste paper and created no legal obligation whatever.

These are, it seems, the only authorities dealing with the effect of a conveyance as beneficial owner. They show clearly that the learned Judges considering this matter did not think that, if the grantor was not in fact the beneficial owner, no covenants would be implied. If this view in fact existed, one would have expected the converse proposition to have been regarded with favour, namely, that, where a person conveyed as beneficial owner, there was a presumption that he in fact was conveying in that capacity. This, however, is not the case, as appears from the decision of the Court of Appeal in *Parker* v. *Judkin*, [1931] 1 Ch. 475. In that case a testator, who died in 1914, after appointing his two sons, G. and S. executors of his will, gave an annuity to his widow and devised certain properties to his two sons charged with the annuity. The sons proved the will and in 1923 conveyed the testator's real estate to a company formed to take over his business. In the conveyance the sons were expressed to convey "as beneficial owners". The property was not conveyed subject to the annuity. Subsequently, the company sold part of the property to the defendant free from incumbrances. The company some five years later failed to pay the widow's annuity and she in this action claimed a declaration that her annuity was a charge on the property sold to J. the defendant. It was, *inter alia*, alleged that the defendant J. as purchaser was put on inquiry by reason of the fact that the sons sold as "beneficial owners". Maugham, J., as he then was, held that this was not so, and his decision was affirmed by the Court of Appeal. The fact that the sons conveyed as "beneficial owners" was not sufficient evidence to show that they were not conveying in their capacity as executors. In so deciding both Maugham, J., and the Court of Appeal accepted as correct the decision of Stirling, J., in *Re Venn and Furze's Contract*, [1894] 2 Ch. 101, at p. 114, and that of Swinfen Eady, J., in *Re Henson*, [1909] 2 Ch. 356, that the mere fact that an executor, who is also a devisee, sells as "beneficial owner" does not of itself put a purchaser on inquiry as to whether all charges created by the testator had been paid. A purchaser, notwithstanding the form of the conveyance, can still assume that the sale is by the vendor in his capacity of executor.

Thus the whole trend of judicial authority until the recent decision of the Court of Appeal was that, if the appropriate words were used, the statutory covenant was implied whatever was in fact the character in which the vendor conveyed. Conveyancing practice undoubtedly generally proceeded on these lines. Not infrequently beneficial owner covenants are required and given although the grantor is not the beneficial owner. This occurs sometimes where the vendors are in fact trustees. It is the general practice for a liquidator to convey as trustee although he is not one (see *Key & Elphinstone's Precedents* (14th ed.), Vol. 1, p. 790; *Prideaux's Precedents* (23rd ed.), Vol. 1, p. 676. A jointress generally conveyed as mortgagee. It is true that *Key & Elphinstone* does provide a form to meet the difficulty. This form, 14th ed., Vol. 1, p. 593, runs

as follows: "And it is hereby declared that the same covenants shall be deemed to be implied by these presents on the part of the said Z as if he had assured and been expressed to assure the premises as trustee." This device is referred to by Sir Wilfrid Greene, M.R., in his judgment with approval, but in fact it has never been generally used by conveyancers. Its adoption in the future would get over the doubts and difficulties raised by the recent decision and its use is perhaps expedient until the matter has been tested in the Courts.

The present position is very far from satisfactory. If the views of Sir Wilfrid Greene, M.R., and Clauson, L.J., are right, the general practice of conveyancers since 1881 has been wrong, with the result that in a very large number of cases the covenants thought to be implied under section 76 of the Law of Property Act, 1925, by the use of the appropriate words are entirely nugatory. Conveyancers cannot regard with equanimity one of their more fundamental practices being held to be wrong and it is to be hoped that this matter will again be submitted to the Courts. The decisions referred to above and not cited in the Court of Appeal suggest that these recent observations are not in line with the judicial authorities.

There is yet another angle from which this matter may be considered, and which possibly is the right one. If the observations of Sir Wilfrid Greene, M.R., and Clauson, L.J., are considered carefully it will be seen that the former alone in terms requires, for the section to apply, that at the date of the conveyance the vendor shall be a person "who can properly be described therein as the personal representative of a deceased person". Clauson, L.J., merely says that the implications of the covenants "is effected only if the conveying party is not only expressed so to convey, but in fact does convey as personal representative".

Clauson, L.J., is therefore much less specific in his statement of the conditions which have to exist for the section to operate. It may be that he did not mean that the conveying party must actually possess the character in which he conveys, but he must merely be expressed to possess that character. This seems in accordance with the views of Kay, L.J., in *Re Ray*, [1896] 1 Ch. 468, and of Cozens-Hardy, J., in *Re Tyrell*, 81 L. T. 675. On this view, the requirements of the section would be fulfilled if the conveyance contained a recital that the grantor was the beneficial owner, or was a personal representative or trustee as the case might be, and conveyed as such. In other words, all that is required is that the conveying party shall be stated, in recital or otherwise, to possess the character in which he conveys, but that he need not in fact possess that character. This construction of the section is in accordance with conveyancing practice and is consistent with the observations of all the Judges other than those of Sir Wilfrid Greene, M.R., in the recent case. The construction has the great merit of convenience, as it means that the covenants will be implied by the section in those cases where they will be most required, that is where for some reason the conveying party does not in fact possess the capacity in which he conveys. Conveyancers will not wish lightly to accept a construction which does not commend itself to Lord Greene, M.R., but in this case,

where the observations which give rise to the difficulty were not made after any argument by counsel on the matter and must really be regarded as *obiter*, his construction requires serious consideration before its adoption by the profession as correct.

THE CONVEYANCER AT QUARTER SESSIONS.

By R. GRAHAM PAGE, LL.B. (Lond.), Solicitor.

This article is a sequel to previous articles in which the conveyancing practitioner's attention was called to the value of something more than a nodding acquaintance with the practice and procedure of both the county court and the police court. It was pointed out that the conveyancer can on many occasions render a valuable service to his client by process in those courts in matters closely related to ordinary everyday conveyancing.

To develop this theme further, there are at least two subjects of litigation—" conveyancing litigation " one might term it—which may draw the conveyancer into yet another court, namely, quarter sessions. Although quarter sessions are essentially courts of criminal jurisdiction—for the trial by jury of prisoners charged with indictable offences—the justices in county quarter sessions assembled (or the borough recorders in boroughs) still retain a far from negligible civil jurisdiction.

Within that civil jurisdiction there are such oddments as the hearing of objections to a declaration preceding an inclosure award, the hearing of the petitions of gas ratepayers or water ratepayers against excessive rates for gas or water supply, and the making of orders to the local authority to seize the property of a husband or parent who has left his or her family " on the parish "—matters which may occasionally interest the conveyancing practitioner. But there are three subjects within that jurisdiction which do, in particular, stand out as substantially conveyancing matters, namely, licensing, highways and rating.

The powers of quarter sessions as compensation authorities and confirming authorities in licensing matters are not such as can conveniently be considered " out of text " in an article of this nature, beyond stating that it is incumbent upon a conveyancer to be familiar with the law and practice relating to licensing and with the nature of the jurisdiction of quarter sessions therein. Even an " isolationist " conveyancer finds himself faced time and time again with licensing problems in the ordinary course of his conveyancing practice.

The jurisdiction of the court of quarter sessions in connection with (i) Highways, and (ii) Rating, can, however, be briefly discussed.

(i) *Highway Jurisdiction of Quarter Sessions.*

This jurisdiction is exercised mainly in connection with the diversion or stopping up of a highway. Once a highway, always a highway—until the justices at quarter sessions decree otherwise, in accordance with the provisions of the Highway Act, 1835.

To take a typical example: Mr. John Brown purchases for development Blackacre Estate consisting of some fields through which runs a winding lane, many years ago dedicated to the public as a highway. The curvatures of the lane interfere with John Brown's scheme for the creation of " desirable residences " and he asks his solicitor who acted for him on the purchase what can be done about it. That learned practitioner probably mumbles something about another client waiting, makes an appointment for a week ahead and tells his clerk to search out the papers of " old Thingummy " who stopped up " something-or-other " cul-de-sac about twelve years ago.

After much memory searching and many tedious references to ancient editions of certain text-books (chiefly distinguishable for their size and weight), the practitioner will be primed with the required information and will be able to advise Mr. Brown that the first step is to obtain a plan of the proposed diversion, showing in detail the existing lane and the proposed new road which is to take its place. Armed with such a plan, a written application can be made to the local authority (the district council in the case of urban districts; the parish council, the rural district council and the county council in the case of rural districts). In addition, Mr. John Brown must obtain the written consents of other landowners (if any) through whose land the proposed new road will pass, to the proposed substitution.

Assuming that Blackacre Estate is situate in a rural district area, three separate written applications would have to be made, each accompanied by a copy of the plan of the proposed diversion, *viz.*:—

(i) To the parish council, requiring a resolution by the council " that it is expedient that the public highway " [here describe the lane by reference to the plan] " be diverted turned and stopped up and that in substitution for the said public highway there should be provided for the use of the public a new highway " [here describe the proposed new road by reference to the plan] " and that the council do consent to such diversion, turning and stopping up of the said public highway and that the clerk of the council be instructed to give public notice of such resolution in manner provided by section 287 of the Local Government Act, 1933."

(ii) To the rural district council, in the same words as above except that the council is not asked to instruct its clerk to give any public notice of the resolution.

(iii) To the county council, requiring a resolution by the council authorising " the clerk of the council to take the necessary steps to carry out the proceedings relating to the diversion, turning and stopping up of a public highway " . . . and here follows the description again.

Those written applications having been duly delivered, Mr. John Brown must wait patiently for the respective councils to pass the required resolutions. In fact, he has to wait longer than that, for the parish council, having passed the resolution as requested, must give the public notice required by section 287 of the 1933 Act (stating therein where and at what times the plan may be inspected by any member of the public) and must then allow not less than two months to elapse before

passing a confirmatory resolution at a further meeting of the parish council.

When the three necessary resolutions have been passed and the parish council's confirmatory resolution has also been passed, a written application should be made to the clerk to the justices requiring two justices to view the highway. The clerk to the justices must be supplied with copies of all the resolutions, certified as true copies by the respective clerks to the councils, and with the written consents of the other landowners (if any) through which the proposed new road will pass.

If the two justices are satisfied that the proposed new road is more commodious to the public, they will direct Mr. John Brown "to cause to be affixed a notice in the form or to the effect of Form No. 19 in the Schedule to the Highway Act, 1835, in legible characters at the place and by the side of each end of the said highway to be diverted turned and stopped up as aforesaid and also at each end of the said new highway for four successive weeks" next thereafter. They will also direct Mr. John Brown to insert for the same four successive weeks a similar notice in the local press (naming the particular newspaper in which it is to be inserted) and also to cause a similar notice to be affixed on the door of the parish church (naming that church) on four successive Sundays next thereafter.

The required notice merely sets out the fact that application will be made on a specified date at a specified time to His Majesty's justices of the peace assembled at quarter sessions in and for the county of X at such and such a place for an order that the public highway (*i.e.*, the lane, which must be described in the notice by words sufficiently explicit to be intelligible without reference to a plan) be diverted, etc., and the proposed new highway (again, fully described in words) be substituted therefor. The notice should end with a statement that the certificate of the justices who have viewed the highway and have found that the same may be diverted, etc., together with the plan of the proposed diversion, will be lodged with the clerk of the peace of the said county on a specified date.

When the month is up, Mr. John Brown must be prepared with proof of the posting of the notices on the highway, that they have remained there as required, that they have appeared in the specified newspaper and that they have been on the church door on the four Sundays. If the justices are satisfied with this proof they will issue their certificate—a long document, reciting the desire to carry out the diversion, the exact diversion to be made (by reference to the plan), the giving of due notice to members of the councils concerned that the required resolutions are to be proposed, the passing of the resolutions, the confirmation of the parish council's resolution, the view made by the two justices, their decision thereon, the consents of any other landowners affected, the directions given by the two justices as to notices, and, finally, the proof of the notices. The operative part of the document is a certificate that the justices did view the lane and that they find that it may be diverted as required "so as to make the same more commodious to the public", that the proposed new highway will when made and opened be more

commodious to the public, and that the old highway will then "become and be useless and unnecessary and may be stopped up and that the reason why the same will become useless and unnecessary is that the said proposed new highway will be more commodious as above mentioned and will alone be used".

Rather long-winded, certainly, but nevertheless making certain upon each point of history in the recitals and upon each point of certification and the reason for it.

The certificate, the plan, the certified copy resolutions, the certified copy notices, and the consents of other landowners must all be forwarded to the clerk of the peace for production to quarter sessions at a court not less than four weeks ahead.

Supposing, therefore, that the matter went through with the least possible delay, it would be some six months from the time of setting the procedure in motion to the date of the hearing at quarter sessions—say, two weeks to obtain the resolutions, a week to publish notice of the parish council's resolution, two months before the parish council's confirmatory resolution, two weeks getting the justices to view and give directions, a week getting out the required notices, a month for the exhibition of the notices and a month after lodging the justices' certificate with the clerk of the peace.

If there is no objection to the proposed diversion, counsel applies to the court for the justices' certificate to be read. When the certificate has been read, it is enrolled, on the motion of counsel, and the diversion order is made.

The proceedings may, however, develop into a full dress trial if there is any objection to the proposed diversion. The objector (called "the appellant") must give fourteen clear days' notice in writing of his intention to "appeal" against the certificate. The notice must state the grounds of appeal and must show (i) that the appellant is a person with a particular grievance and that he will, if the diversion is carried out, suffer greater hardship or injury than the public generally; and/or (ii) that some item in the procedure detailed above was not properly observed so that the proceedings have been invalidated by irregularity.

It is for the appellant to prove his case and justify his objection—and he must do so before a jury of "disinterested persons", *i.e.*, not inhabitants of the district. The jury will be directed to decide, as a question of fact, (i) whether or not (a) the proposed new highway is more commodious than the old one, or (b) the old highway is unnecessary, and (ii) whether or not the appellant would suffer special damage if the proposals were carried out. Only if both these questions are answered in the affirmative will the order be made.

Even if the diversion order is made, that does not end the proceedings. Mr. John Brown can proceed with the development of the new road, but he must not close the old lane until the matter has once more come before quarter sessions. When the new road is all ready for traffic, another application must be made to the justices' clerk for two justices to view the new road. If upon this view, the two justices are satisfied that the new road has been "completed and put into good condition

and repair ", they will issue a further certificate accordingly—containing once again recitals of the procedural history of the case. The certificate must be lodged with the clerk of the peace and counsel instructed to apply at the next quarter sessions for it to be read and, finally, to move that it be enrolled.

This gives in outline the procedure relating to diversion cases and it only remains to mention the few other highway cases that are dealt with by quarter sessions. They are:—

(1) Motions for stopping-up orders, for which the procedure is exactly the same as in diversion cases except that the further certificate (*i.e.*, of completion of a new road) is not, of course, necessary.

(2) Motion by a local authority for relief from liability to repair a certain highway. The procedure is, again, similar to that in diversion cases—or, more correctly speaking, in stopping-up cases. As no stopping-up order is made in these cases any interested person may at any time move the court for an order that the liability for repair be revived, on the grounds that circumstances have altered since the previous order was made.

(3) Disputes as to the amount of compensation payable to landowners affected when two justices have ordered that a certain road be widened. The amount is assessed by a quarter sessions jury of " disinterested persons ".

(ii) *Rating Appeals to Quarter Sessions.*

It would be inappropriate, not to say futile, to attempt any discussion of the substantive law of rating here, or even to deal in full with the procedure relating to rating appeals; nevertheless, to follow the hypothetical John Brown through the procedure of a rating case which might well arise from the fictitious diversion application may be of some value.

Let it be supposed that the local authority is quick to realise the enhanced value of some buildings on the land purchased by Mr. John Brown, by reason of the construction of the new road.

First Mr. Brown will receive a notice from the clerk to the rating authority informing him that on a given date at a specified place the assessment committee will hold a meeting for considering a proposal for amendment of the valuation list. Particulars of that proposal will be attached to the notice and Mr. John Brown will be informed that, if he desires to object, he should do so in writing not later than seven days before the date of the meeting, but that he need not attend the meeting because it will be adjourned for the consideration of any proposals to which objections have been properly made.

The notice will state where the forms of objection may be obtained. Mr. Brown should complete one of those forms and lodge it with the clerk to the rating authority in due time. He will then receive a further notice giving the time and place at which the objection will be heard and determined by the assessment committee. Mr. Brown should attend that meeting himself or by counsel, solicitor or agent, and put forward arguments in support of his objection to the proposal. Appearance before the assessment committee at the meeting is a condition precedent to any appeal from the decision of the committee.

So that this hypothetical case may proceed to appeal on the instance of Mr. Brown, let it be supposed that the assessment committee upholds the rating authority's proposal. Mr. Brown will then receive a notice to this effect from the clerk to the committee. The notice will inform him that he may within twenty-one days after the date of the decision appeal against the decision to the court of quarter sessions for the county or borough in which the property in question is situate.

Unless this is a case in which Mr. Brown's solicitor intends to appear himself at quarter sessions (and he is entitled to do so when the rateable value of the property does not exceed £100, provided the appeal is not to any borough quarter sessions in which the rules preclude appearance by solicitor), counsel should be instructed at this stage, if not before, to draft the notice of appeal, because the notice limits the hearing of the appeal to the grounds of appeal set out therein. The notice should state that Mr. John Brown (thereinafter called "the appellant"), being aggrieved by the decision of the assessment committee given on such and such a date at the hearing of a proposal for amendment of the valuation list in respect of the property—a description should be given—of which the said committee determined the net annual value to be £——, intends to appeal against such decision to the court of quarter sessions for the county. Then follow the grounds of the appeal, and the notice concludes with an address for service.

The notice must be lodged with the clerk of the peace (with a hearing fee of 10s. (net annual value not exceeding £100), £1 (not exceeding £300), £3 (exceeding £300)) and copies must be served (either personally or by delivery or posting to the usual or last known place of abode of the person to be served) on the clerk to the assessment committee, the clerk to the rating authority, the occupier of the property concerned (if he is other than the appellant), and the owner if he is rated but is not the occupier or the appellant. Any of these persons or bodies, and also the county valuation committee, may appear as respondents to the appeal provided they give notice to the clerk of the peace and to the appellant of their intention so to do within fourteen days of the receipt of the notice of appeal.

An interesting item of procedure is that an occupier (or a rated owner) can, if the rating authority is the appellant, give notice that he wishes to be called as a witness instead of appearing as a respondent. So Mr. Brown could have done, had the decision of the assessment committee gone in his favour and had the rating authority pursued the matter to appeal—and he would thereby have avoided the risk of being saddled with the costs in the event of the appeal being successful.

The Rating and Valuation Act (Assessment Appeals) Rules make provision for interlocutory matters to come before the clerk of the peace. Although the clerk may arrange for the parties to appear before him, such matters are usually carried out by correspondence. If the net value of the property does not exceed £200, there will probably be very little to be done by way of interlocutory application, because, without any further application, the clerk, on receipt of the notice of appeal, will enter the appeal for hearing. If, however, the net value

of the property exceeds £200 the case proceeds rather in the fashion of an ordinary High Court action. In such circumstances Mr. Brown and his solicitor must be prepared to deliver a statement in the nature of a statement of claim within fourteen days of receipt of the first notice of a respondent of intention to appear. That statement must set out the facts to be proved and the points of law to be argued in support. Each respondent must reply to the appellant's statement of claim (or " case " as it is called) by a statement of his or its own " case " within fourteen days of service of the appellant's case. Both statements must be served on the clerk of the peace and on all other parties—and, for county sessions, six other copies must be supplied for the use of the court. It can be appreciated that this procedure may involve various applications to the clerk of the peace, such as, for example, for extension of time, for postponement of the hearing, to fix the date for the hearing, etc.

When the case eventually comes on for hearing, it is heard in borough quarter sessions by the recorder and in county quarter sessions by the Standing (Rating Appeal) Committee. The latter is a " committee " appointed by the court and is, by virtue of the Rating and Valuation Act, 1925, invested with the powers and duties of the court with regard to rating appeals.

The hearing itself does not differ materially from the trial of any civil action and the decision of the Court is finally embodied in a statement in writing sent by the clerk of the peace to the rating authority and the assessment committee.

The final step in the matter is the question of costs. The court will award costs as it sees fit—except that an unsuccessful appellant cannot be ordered to pay more than one set of costs. The costs are taxed by the clerk of the peace (taxation fee, one shilling for every £2) and it is more than a matter of mere interest for the parties' solicitors to note the fixed items in the scale laid down by the Rules when the net annual value does not exceed £100. In other cases the High Court scale is, in practice, applied. Another important item of expenses to note is the limitation of fees payable to expert witnesses.

Mr. Brown may, of course, have instilled such fear into the rating authority and the assessment committee by his determined pursuit of the appeal that the matter never reaches a hearing and is closed by an agreement between the parties. Such an agreement must be embodied in a consent order, and so that it shall be so embodied particulars of the terms agreed, signed by the parties or their solicitors, must be sent to the clerk of the peace. At any subsequent sitting of the court the clerk will read those particulars and an order or judgment will be made or entered accordingly without the parties having to appear—unless the Court for any special reason requires their attendance.

Another possibility is that the parties may agree to refer the matter in dispute or any question or issue arising thereon, to arbitration. The arbitrator's decision is then enrolled at quarter sessions upon the application of either party by notice of motion served upon the clerk of the peace.

It should be appreciated that this statement of the procedure in

rating appeals (as that of the procedure in highway cases) is in no way intended to be exhaustive. If the statement encourages the practitioner to investigate the subject with greater thoroughness than can be devoted to it here, it will have served its purpose. Doubly will that purpose be served if the conveyancing practitioner has once again been brought to realise the value of an acquaintance with that side of litigation which is so intimately connected with his daily practice.

THE DISCHARGE AND MODIFICATION OF RESTRICTIVE COVENANTS.

By E. H. Bodkin, Barrister-at-Law.

Section 84 of the Law of Property Act, 1925, confers two distinct powers, *viz.*, a power for the Official Arbitrator to discharge or modify restrictions as to user or building affecting land, and a power for the Court to declare in accordance with general principles the nature and extent of such restrictions and whether they are still enforceable, and if so, by whom. The first of these powers is to be exercised upon grounds to a great extent similar to those upon which the Court can under the second declare that the right to enforce such restrictions has been lost by acquiescence or otherwise; and it will be convenient therefore to deal first with these equitable grounds and then to consider how far they have been extended by the provisions of the section.

There is a distinction to be drawn between cases where a restrictive covenant is enforceable only in equity against an assign with notice and where there is a right of action at law by reason of the defendant being a party to the instrument creating it. In the former case acquiescence or mere delay may be a bar; whereas in the latter, as Farwell, J., pointed out in *Osborne* v. *Bradley*, [1903] 2 Ch., at p. 451, "nothing short of such conduct as would have supported an equitable plea under the Common Law Procedure Act, or before that Act would have justified the Court of Chancery in granting an injunction restraining the action, will suffice to bar the plaintiff's right to sue on his covenant"; *e.g.*, the plaintiff may have so conducted himself that a reasonable man would conclude that he had given his consent to the breach, as in *Davies* v. *Marshall*, 31 L. J. C. P. 61.

Although notice of a breach may in some cases be presumed, it is not essential in order to prevent the equitable remedy being lost by acquiescence "to conduct inquisitorial examinations into neighbours' lives" (see *Tubbs* v. *Esser*, 26 T. L. R. 145; *Chatsworth Estates, Ltd.* v. *Fewell*, [1931] 1 Ch. 224). And it has been held in numerous cases that acquiescence in breaches of a trivial or unobvious nature, or which do not damage the intended appearance, or interfere with the general scheme of, the estate, or which are committed on parts of it remote from the plaintiff's land, will not generally be a defence. In *Rowell* v. *Satchell*, [1903] 2 Ch. 212, acquiescence by a purchaser in respect of

part of a plot was said to be no bar to proceedings by a subsequent sub-purchaser from him of another part. Acquiescence in a small and limited breach by the defendant, or even the commission of such a breach by the plaintiff himself, will not (as appears from *Richards* v. *Revitt*, 7 Ch. D. 224, and *Western* v. *MacDermott*, L. R. 2 Ch. 272) necessarily preclude an action in respect of a wider and more important breach of the same covenant. If the scheme be not a purely residential one, acquiescence in the erection of shops in a portion of the estate not scheduled for them will not constitute a bar to proceedings to prohibit them in other parts (see *Ramuz* v. *Leigh-on-Sea Conservative and Unionist Club, Ltd.*, 31 T. L. R. 174).

On the other hand, where departure from the covenants in one instance would nullify the scheme, as in the case of covenants intended to secure uniformity of design in a terrace, a single instance of acquiescence may be sufficient to disentitle the plaintiff to proceed in equity (see *Roper* v. *Williams*, T. & R. 18; *Peck* v. *Matthews*, L. R. 3 Eq. 515; *German* v. *Chapman*, 7 Ch. D. 271).

In *Gaskin* v. *Balls*, 13 Ch. D. 324, a mandatory injunction to pull down buildings in existence when the plaintiff purchased his plot, and as to which he had taken no action for five years, was refused. A longer period, however, is required to bar the right to sue in the case of mere delay than of acquiescence; and the former defence is generally more readily applicable to cases of continuing breaches (see *Sayers* v. *Collyer*, 28 Ch. D. 103). After a long period of open and notorious user in breach of a covenant, waiver by the covenantee and the other persons entitled to the benefit of it may be presumed; and the same applies as between landlord and tenant, and possibly in the case of building schemes (see *Gibson* v. *Doeg*, 2 H. & N. 615; *Hepworth* v. *Pickles*, [1900] 1 Ch. 108; see, however, *Duke of Devonshire* v. *Broomslaw*, 81 L. T. 83). In *Chatsworth Estates* v. *Fewell*, *supra*, Farwell, J., after observing that in some cases equity was said to refuse relief on the ground of implied waiver and in others on acquiescence in past breaches, expressed the view that it was a fair test to treat it as analogous to estoppel, the question being whether the plaintiff has by his acts or omissions represented to the defendant that the covenants are no longer enforceable and that he is therefore entitled to use his property as he is doing. On this principle acquiescence in breaches of one nature is no bar to relief in breaches of another, provided the former are not such as to alter the character of the neighbourhood; and in the above case permitted user of some buildings as flats in breach of a covenant to use as private dwelling-houses only was held to be no defence to proceedings in respect of user as a boarding-house. The covenant was intended to preserve the residential character of the area, and there was a clear distinction between residential flats and boarding-houses (see also *Osborne* v. *Bradley*, *supra*).

A departure in the conveyance of one plot from the covenants of a building scheme cannot (unless made under an express power) affect the rights of prior purchasers; and whether it is unintentional, or, it seems, intentional, it will not prevent the original covenants remaining mutually

binding and enforceable between the grantee and such purchasers, though it will be effective as regards those who buy their plots subsequently (*Knight* v. *Simmonds*, [1896] 2 Ch. 294; *Rowell* v. *Satchell*, *supra*). The insertion in the conveyance of a covenant not without the vendor's consent to do what is absolutely prohibited by the general covenants is not such a variation as to prevent the purchaser enforcing the latter, at any rate if no such consent has ever been given (see *Knight* v. *Simmonds*, *supra*). As to the position of a purchaser of two plots who has sold one with a variation of the covenants as against a purchaser from him of the other, see *Elliston* v. *Reacher*, [1908] 1 Ch., at pp. 392, 692). Similarly when part of the land has been laid out by a purchaser under a sub-scheme with different stipulations, the parties thereto and their assigns with notice will be entitled *inter se* to enforce only the new stipulations, though as between them and prior purchasers under the original scheme the covenants in the latter will remain binding (see *Knight* v. *Simmonds*, *supra*).

Alteration in the character of the neighbourhood caused by the acts or omissions of the plaintiff or his predecessors in title is a bar to enforcing covenants which have been imposed to preserve the character of the adjoining property; though not (as appears from *Osborne* v. *Bradley*, *supra*) if they have been imposed for the vendor's personal benefit. The contrary is true if the alteration is due to a variation in the covenants made under an express power of variation in the scheme; but such a power does not generally extend to permitting radical changes in the neighbourhood (see *Zetland* (*Earl of*) v. *Hislop*, 7 App. Cas. 427; *Whitehouse* v. *Hugh*, [1906] 2 Ch., at p. 246; *Ives* v. *Brown*, [1919] 2 Ch., at p. 319). Alteration appears to be no defence as between landlord and tenant when there has been a renewal of the covenants, since there would be an estoppel by deed against contending that they were unenforceable (see *Craig* v. *Greer*, [1899] 1 Ir. R., at p. 297, and generally as to leasehold building schemes, *Tubbs* v. *Esser*, *supra*).

It is still doubtful whether alterations *outside* the area of the scheme, whether caused by the vendor or by other adjoining owners, will constitute a defence to enforcing the covenants. Sargant, J. (as he then was) expressed the view in *Sobey* v. *Sainsbury*, [1913] 2 Ch. 513, that under the "express and precise language of Lindley, L.J., in *Knight* v. *Simmonds* and of James, L.J., in *German* v. *Chapman*, *supra*, the Court was entitled to take into account a general change in the character of the neighbourhood, irrespective of the particular acts and omissions of the plaintiff and his predecessors in title". The general principle on which Lindley, L.J., based his judgment in the above case—*viz.*, that "Courts of equity look not only to the words of a covenant but to the object to attain which it was entered into, and if, owing to circumstances which have occurred since it was entered into, that object cannot be attained, equitable relief will be refused"—would, if strictly applied, cover this case as well as that of alteration within the area to which Lindley, L.J.'s, judgment was primarily directed; though as he pointed out, alteration within the area could hardly have arisen except from a departure by the vendor from the scheme or the acquiescence or laches

of those entitled to enforce the covenants. Further, as Sargant, J., pointed out, owing to the great extension of the obligation in equity in allowing the covenants to be enforced against assigns with notice and under building schemes, and by granting specific performance by way of injunction instead of mere damages, the effect of limiting the Court's discretion to refuse relief to cases where there has been default by the plaintiff or his predecessors in title would be to stereotype and perpetuate the covenants far beyond the real intention of the contracting parties, and to open the door to extracting money out of obsolete restrictions.

The contrary view was, however, taken by Farwell, J., in *Chatsworth Estates, Ltd.* v. *Fewell, supra*; by the Irish Court of Appeal in *Craig* v. *Greer, supra*; and apparently by the English Court of Appeal in *Pulleyne* v. *France*, 57 S. J. 103. Cf. *White* v. *Bijou Mansions, Ltd.*, [1937] 1 Ch. 610, where alteration within the area was not substantially caused by the plaintiff himself. In any case the change in order to be a defence would (as in the case of changes occurring within the area of the scheme) require to be so complete that there was no longer any value left in the covenants and an action to enforce them would be " unmeritorious, not *bona fide* at all, and merely brought for some ulterior purpose " (see *per* Farwell, J., in *Chatsworth Estates, Ltd.* v. *Fewell, supra*; adopted by Slesser, L.J., in *Westripp* v. *Baldock*, [1939] 1 All E. R. 279).

The power of the Court under sub-section (2) of section 84 of the Law of Property Act, 1925, to make a declaration that a covenant is unenforceable clearly covers all the cases considered above where the right to enforce it has been wholly or partially lost by delay or acquiescence, whether the land is freehold or leasehold.

There are certain other cases not depending on acquiescence where the right has been lost to which it would also apply, *e.g.*, where (as may still occur notwithstanding the necessity for registration of restrictive covenants) an interest in the land has become vested in an assign for value without notice; or, where the covenant was taken to enable the covenantee to dispose of his land to greater advantage, and the benefit was not annexed to his land, he has disposed of all such land without expressly assigning the benefit of the covenant (see *Re Union of London and Smith's Bank's Conveyance*, [1933] 1 Ch. 611); or again where (as in *Re Ballard's Conveyance*, [1937] 1 Ch. 473) the attempted annexation of the covenant to the vendor's land is ineffective. The grounds on which a restriction (whether created by an instrument or not) may be wholly or partially discharged or modified by the arbitrator are set out in section 84 (1) of the Law of Property Act, 1925, and have been recently extended by section 18 of the Landlord and Tenant (War Damage) Act, 1939, which will be considered later.

The grounds set out in section 84 (1) are:—

" (a) that by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the Authority may deem material, the restriction ought to be deemed obsolete, or that the continued existence thereof would impede the reasonable user of the land for public or private purposes without securing practical benefits to

other persons, or, as the case may be, would unless modified so impede such user; or

" (b) that the persons of full age and capacity for the time being or from time to time entitled to the benefit of the restriction, whether in respect of estates in fee simple or any lesser estates or interests in the property to which the benefit of the restriction is annexed, have agreed, either expressly or by implication, by their acts or omissions, to the same being discharged or modified; or

" (c) that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction."

The sub-section does not apply when the restriction was imposed on the occasion of a disposition made gratuitously for a nominal consideration for public purposes, or in certain other special cases mentioned in sub-section 11; but it applies whether the restrictions were imposed before or after the Act.

In *Re Henderson's Conveyance and re Law of Property Act, 1925*, [1940] 1 Ch. 835, Farwell, J., held that in order to bring the case within section 84 (1) there must (apart from sub-section (1) (b)) be some proper evidence that the restriction was no longer necessary for any reasonable purpose of the person enjoying the benefit of it, or that by reason of changes in the character of the property or of the neighbourhood it was no longer one to be enforced or had become of no value, or that there was a real necessity for the modification to enable the proper development of the neighbouring property; the Act was not designed to enable a person " to expropriate the private rights of another for his own benefit ". He accordingly set aside an order of the Arbitrator modifying a covenant against the building upon a part of the covenantor's property which adjoined the covenantee's garden so as to permit the erection of a private house and garage. There was no change in the character of the property or of the neighbourhood, although there was a tendency to build smaller houses; the covenant did not impede user of the land for private purposes, as the house could be built upon another part of the covenantor's land, and the covenantee enjoyed a practical benefit in having an open space next his garden and not being overlooked.

It is clear from the use in sub-section (1) of the word " neighbourhood " in contradistinction to " property " that it will include (as it was regarded in the above case) property other than that to which the benefit of the covenant is annexed, whether belonging to the covenantee or not; though its scope is probably narrower than that of the same word in section 163 of the Housing Act, 1936. " Change " would also appear to extend, as in the latter section, to changes other than physical. " Other circumstances of the case " appear from Farwell, J.'s, judgment to apply to cases where the restriction was imposed to protect the covenantee in a particular user of the land which has ceased. Sub-section (1) (b) adopts the principle of quasi-estoppel applied in *Chatsworth Estates, Ltd.* v. *Fewell, supra*, while sub-section (1) (c) would seem to adopt that referred to by Lindley, L.J., in *Knight* v. *Simmonds, supra*. Another point of importance is that the section

draws no distinction between cases where the covenant is enforceable at law and where there is only a remedy in equity.

No compensation is payable to the person entitled to the benefit of the restriction unless he suffers loss by its discharge; but this does not affect any right to compensation if by reason of the imposition of the restriction the amount of the consideration paid for the land was reduced.

Section 84 (apart from its war-time extension) applies only to freeholds and to leases (other than mining leases) for terms of more than seventy years whereof fifty years have expired at the date of the application.

It was held in *Cadogan* (*Earl*) v. *Guinness*, [1936] 1 Ch. 515, that where the term granted by the lease commences from a date prior to its execution, the period of fifty years is to be calculated not from the date of the commencement of the term but from that of the execution; and the same would, it seems, apply to the period of seventy years.

Under section 18 of the Landlord and Tenant (War Damage) Act, 1939, the application of section 84 is extended to all ground and "multiple" leases (as defined in that Act) whatever the term of the lease and whatever period of that term has expired when the buildings have been rendered unfit by war damage, provided the application is made prior to their being rendered fit. Further, the covenants may be discharged or modified on the additional ground that it is necessary or desirable in order to permit the economical use or development of the land, or is otherwise desirable in the national interest; and in such cases the power may also be exercised in relation to any similar restrictions affecting the freehold reversion.

The procedure under section 84 (to which is now added by the Administration of Justice Act, 1933, a new sub-section (13) dealing with costs) is regulated by R. S. C., Order 54D and Law of Property (Restrictive Covenants Discharge and Modification) Rules and Fee Rules, 1933.

The application is by Summons in Chambers and should be entitled "In the Matter of the Act and the Property", naming it (Order 55, r. 14A; *Re Broom Hall Estate*, [1939] W. N. 316). The Court should make every effort to see that all persons interested have an opportunity of being heard, and all those having a "probable interest" should be made parties (*Re Sunneyfield*, [1932] 1 Ch. 79; *Re Ecclesiastical Commissioners' Conveyance*, [1936] Ch. 430); but the order will under sub-section (5) be binding on them whether they are parties or not. When a serious point of law arises as to whether the right to enforce the restrictions has been lost, the arbitrator should give facilities for raising the question before the Court, either by requiring it to be determined under sub-section (2) and adjourning the application into Court; or alternatively, if so requested, determining whether, on the assumption that the objector can enforce them, any and what compensation is payable (see *Re Spencer Flats, Ltd.*, [1937] 1 Ch. 86).

When proceedings are taken to enforce a restrictive covenant, the defendant may under sub-section (9) apply in the proceedings for an order giving leave to apply to the arbitrator and staying the proceedings in the meantime. But such an order should not (as appears from

Feilden v. *Byrne*, [1926] Ch. 620) be made unless the relief sought is such as could not be obtained in the action, *e.g.*, modification only of the restrictions; and if such issues as change in the character of the neighbourhood or acquiescence are raised, the plaintiff may insist on their being tried in the action (see also *Chatsworth Estates, Ltd.* v. *Fewell*, *supra*, where an application for leave to apply to the arbitrator was refused at the trial). The power conferred by section 84 is expressly made subject to the concurrent jurisdiction of the Court. In *Feilden* v. *Byrne*, *supra*, the defendant was required to proceed with the application forthwith and to prosecute it with diligence. An action by a landlord for possession after notice to remedy a breach of covenant is not a proceeding to enforce it within sub-section (9) (see *Iveagh* v. *Harris*, [1929] 2 Ch. 142; cf. *Angell* v. *Burn*, 77 S. J. 337, where an order for possession was suspended conditionally upon an application to the arbitrator being made).

An appeal from the arbitrator lies to the Chancery Division under R. S. C., Order 54D, though not if he has made no order (see *Re Lancaster Gate*, [1933] 1 Ch. 419). The duty of the Court on appeal was said by Farwell, J., in *Re Henderson's Conveyance*, *supra*, to be, so far as necessary, to rehear the application. It can require witnesses to attend; but generally the matter is dealt with on the facts before the arbitrator. The Court will be slow to interfere with the latter's decision, unless satisfied that he has not considered, or not given proper consideration to, the material facts, or has misunderstood his function or misconstrued the section.

Under section 163 of the Housing Act, 1936, the county court has power when it is proved that a house, owing to changes in the neighbourhood, cannot readily be let as a single tenement, but could readily be let for occupation if converted into two or more tenements, to vary the terms of any lease or other instrument imposing restrictions on such conversion, upon such terms and subject to such restrictions as it thinks just. The section was said by Younger, L.J., in *Alliance Economic Investment Co., Ltd.* v. *Berton*, 39 T. L. R. 393, to extend to freeholds as well as leaseholds, and to have for its primary object the provision of increased accommodation for tenants; though it was held in *Johnston* v. *Maconochie*, [1921] 2 K. B. 239, that it was of general application and not confined to houses suitable for the working classes. It was held by the Court of Appeal in *Alliance Economic Investment Co., Ltd.* v. *Berton*, *supra*, that the onus was on the applicant to prove that the house was not readily lettable as a single tenement, that it was so lettable if converted, and that these two facts were due to changes in the character of the neighbourhood. What constitutes the "neighbourhood" was said by Bankes, L.J., to be a question entirely of circumstances; it might be a single street or square, or its boundaries might be determined by physical conditions, *e.g.*, a range of hills, a river or railway, or the line separating a high-class district from workmen's dwellings. Younger, L.J., on the other hand, said he could not think of a better test than that adopted by Salter, J., in the Divisional Court, *viz.*: "If in the district where the house is there is a change of character

which does in fact produce the result of rendering the particular house not readily lettable, then if it is near enough to produce the result, it is near enough to be in the neighbourhood."

The " change " is not, it seems, confined to physical change; though mere alteration in the way of life of the inhabitants was regarded by Bankes, L.J., as not enough, if the same class is willing to reside there, even at a lower rent; and the mere fact of the conversion of the houses into flats would not of itself constitute a change, provided they were occupied by the same type of resident. But if the old class will not live there as a result of a general reduction in the standard of living, or because the neighbourhood has became unfashionable, the case will not, it seems, fall within the section. The date when the change takes place was regarded by Younger, L.J., as immaterial. No compensation is under the section payable to any person unless it is imposed by the Court as a condition of its order; nor is there any obligation (apart from such condition) to let the house in tenements when the order has been made; the owner is free to dispose of his interest as he pleases. Neither the landlord, nor, in the case of a building scheme, adjoining owners, are given separate status on the application, though they are included in " persons interested "; and Younger, L.J., comparing the section with section 90 of the Law of Property Act, 1922 (now section 84 of the Act of 1925), described it as " impressionist ". The decision of the County Court Judge is final, provided there is evidence on which he could act and he did not misdirect himself.

REGISTERED CONVEYANCING TECHNIQUE.

When the writer first became intimate with registered conveyancing more than a quarter of a century ago the attitude of the profession, so far as his young experience could gauge, was clear cut and simple. In compulsory areas it was necessary, or at least highly desirable (see *Capital and Counties Bank* v. *Rhodes*, [1903] 1 Ch. 631) that dealings with the legal estate should be protected by registration of title or an entry in the register. To achieve this there were certain printed forms which could be filled up to pass the scrutiny of the Registry officials. But all real conveyancing was to be done by documents, many of which were never presented to the Registry, and which were designed to follow the precedents for unregistered conveyancing. Similarly, it was rare to meet an application for an absolute title and under the then prevailing rules only the last conveyance to the applicant was left with the Registry upon an application for a possessory title. This was not an attempt to practise registered conveyancing, but to make a minimum compliance with obnoxious rules. The writer has not quite the same opportunities now of gauging the attitude towards registered conveyancing, but he has some suspicion that part of the current practice is derived from a similar source. It is suspected that many practitioners attempt to keep as many interests as possible out of forms which are to be lodged at the Registry, very often

adopting the method of "caution" to protect rights which in unregistered conveyancing might be incorporated in a dealing with the legal estate. This does not appear to be making the best use of the system of registration.

With the passing of the Land Registration Act, 1925, certain changes were made in the law designed, as it would seem, to avoid some of the effects of the old practice. In particular it was provided that "the estate for the time being vested in the registered proprietor shall only be capable of being disposed of or dealt with by him in manner authorised by the Act": L. R. Act, s. 69 (4); and the legal estate is only transferred by registration and not by the transfer itself: L. R. Act, s. 19 (1); thereby overruling in large measure the decision in *Capital and Counties Bank* v. *Rhodes* (*supra*), which the draftsman appears to have had in mind. Moreover, the principle on which the 1925 Act was framed seems designed to give effect to the underlying basis of the whole 1925 legislation, with perhaps greater effect, as it is summed up in section 74, which enacts that the Registrar shall not be concerned with trusts of registered land.

Quite apart, however, from any statutory provisions practitioners must face the system of registered conveyancing in the light of a practice appropriate to all conveyancing and not merely regard it as an appendix to an existing law. It is peculiarly hard, as we have all learned, to divorce from our minds principles and practices of law in which we have been bred. The most superficial acquaintance with conveyancing under the 1925 legislation as carried out by practitioners accustomed for any considerable period to the old law shows that old ways die hard. It doesn't seem to matter that often error lies that way. It doesn't seem to matter that by adopting a circuitous route made out of the old learning the advantages of the new law are lost. If by bringing the equities on to the title we may avoid the new way and its seeming complications never let us mind that the title may be complicated for a generation though the new way sought to relieve us of this complication. This is, of course, a hard saying and not entirely just, but it has this much point in the present argument. Registered conveyancing has in fact produced a new land law and a new system of conveyancing. The forms that we should adopt now, while the number of cases is relatively small, are those forms which will build up a new practice adapted entirely to the new law. This view imposes a heavy burden upon the practitioner accustomed to old ways, but this must be disregarded if the system is to be worked to best advantage.

By way of parenthetical illustration of the point that a new technique should be employed rather than an attempt at the irreducible minimum of change, let us refer to the not uncommon practice of protecting interests not directly representing registrable interests by way of caution. A document is drawn up in the old form between the registered proprietor and the other party or parties interested. This is followed by a caution noted on the register. This caution, of course, gives no indication of the character of the interest so protected, but merely that the registered proprietor may be restricted in his powers of disposition if the cautioner persists in his claim. Now a caution is a hostile proceeding as its name

implies, as its procedure suggests and, it is believed, as the Registry so regards it (*a*). If any disposition is intended by the proprietor it will not be registered until the Registry has " warned " the cautioner and he has either neglected the warning or failed to convince the Registrar or the Court that he is entitled to object. This is what the caution contemplates. In many cases, such as those mentioned in this illustration, there is no hostility. If the disposition is to be free of the interest the cautioner withdraws it, and if the disposition is to be subject to it application is made to note the interest on the register. In most cases such as these the Act itself contemplates a different procedure, namely, that of notice. Here the interest is in fact noted on the register and a disposition will be subject to the notice unless it is, as it can be, withdrawn. This procedure avoids the complications inherent in the use of a caution that is natural in a hostile proceeding. It is just the anxiety to avoid the true use of all aspects of the register that leads to this kind of practice. The register is secret and no person can inspect it without the authority of the proprietor, so that really there is no reason why the interest should not be noted save that the Registry will require a certified copy of the instrument creating the interest which might well prove less expensive than the subsequent transactions with a caution. This brings us back to the original contention that the register should be approached from a new angle. We should not say how much can be kept off the register and dealt with as if the land were not registered, but how much should go on the register and by what appropriate method.

Owing to the officiousness of Courts of Equity in binding purchasers with all sorts and conditions of trammels conveyancers have acquired a secretive habit. Various devices have been adopted to screen such interests from the inquiring purchaser's eyes leading up to the provisions of the Law of Property Act, 1925, and the Settled Land Act, 1925. This " conveyancer's low cunning ", so long the jibe of the common lawyer, is not really demanded by the system of registered conveyancing. The equitable doctrine of notice as it affects the legal estate is virtually destroyed for registered conveyancing though it lingers in the older field.

Old habits die hard, but the primary concern of the practitioner should be to consider what should appear on the register and in what form. In drafting forms for use in connection with registered land two principal factors should be borne in mind. First, that any registered instrument will be filed at the Registry, and secondly, that interests not protected on the register will be overridden by a registered disposition unless they are overriding interests. Ancillary to this is the most important question of what disposition creating interests in land will be effective against the legal estate if the interests are not incorporated in a disposition filed at the Registry.

Another point in registered conveyancing is that the property is governed by the description on the register which is intimately connected with and not infrequently governed by the filed plan or general map. A registered proprietor owns no more or less than is covered by this

(*a*) A cautioner is liable for any damages caused by lodging a caution without reasonable cause: L. R. Act, s. 56 (3).

description, subject, of course, to rules relating to overriding interests, which includes rights acquired by adverse possession. Failure to adhere to the registered description may result in serious difficulties. Furthermore, by reason of the Rules certain references to the register must appear in any document to be filed with the Registry. It is obviously convenient that as far as possible the general tenor of the prescribed forms should be employed notwithstanding that the transaction is one which does not fall within the category of those for which there is a prescribed form.

If forms are to be drafted which depend in a large measure upon reference to the register this alone seems some ground for incorporating them on the register, but, again, taken alone is not sufficient. What is important is the desirability of incorporating in registered transactions interests which could, no doubt, be effectuated to a greater or less degree independently of the register.

The commonest objection that is made to including in a registered transaction anything more than the most formal facts necessary to carry it out in connection with the rules is that the document being filed will be lost sight of in any further dealings. The officials at the Registry still vary somewhat in the character of their entries on the register itself and in the absence of a note it is felt that the matter will be overlooked. One short answer to this, of course, is the retention of a duplicate copy which will not cost more than a separate instrument. The other is that some care should be taken to see that interests which directly affect the legal estate are noted in some form on the register itself. The filed document will always be produced by the Registry upon production of the appropriate authority to search (L. R. R. 296), and an office copy can be obtained which is admissible as evidence (L. R. R. 264). The fact that an office copy can be obtained is one of the safeguards in these uncertain times which should be an added attraction.

Now a registered disposition may, apart from the matters specifically required to be effected by registered transfer, lease or charge, include four matters: (i) overriding interests; (ii) minor interests which must be protected if they are not to be overridden; (iii) minor interests which will be overridden whether or not they are to be protected; (iv) collateral matters which only indirectly affect the registered title. These matters require separate consideration.

(i) Overriding interests are the bugbear of registered conveyancing. Incidentally, the analogous interests in unregistered conveyancing provide many of its practical problems. In so far as these interests bind registered titles independently of any note on the register they may be regarded as outside the scope of registered conveyancing. This view is probably not accurate. First, despite the fact that the Registrar need not direct any note on the register it is open to question whether a registered proprietor can create an overriding interest within his powers otherwise than by a registered disposition (see III K. & E. p. 59), presumably a disposition filed at the Registry.

Secondly, an overriding interest can only be conveniently created by reference to the registered description of the servient and dominant

tenements, if they are registered. It is, therefore, desirable to follow as closely as possible the formulæ provided by the Rules.

Thirdly, application can be made, and it appears usually to be granted, for an entry of both the burden and benefit of any overriding interest so created. Whether such an entry of the benefit confers the title enjoyed by the proprietor of the registered interest is no doubt a matter which will one day be decided. In practice the Registry are very careful about noting entries in favour of overriding interests, such as rights of way, granted by unregistered grantors before a title is registered.

Fourthly, if the grant is made and the instrument filed there is little likelihood of subsequent difficulty provided a note is made on the register. A purchaser is, apart from contract, entitled to an abstract of such overriding interests and an office copy is a very simple solution.

For these reasons it is felt that all overriding interests should in fact be created and dealt with by means of instruments filed at the Registry. This may not have been intended, but the real reason for their exclusion from registrable interests seems to be different. First, most of these rights can be acquired by prescription or adverse possession. Secondly, it is clearly undesirable that they should be capable of registration independently of the estate to which they belong or affect. Thirdly, a number of them are capable of being created by implied grant. Accepting these principles it is easy to understand why overriding interests have been left as they are. But it seems equally clear that in so far as they are created by express grant by a registered proprietor it is desirable that this should be done by a disposition filed at the Registry and noted on the register of both the dominant and servient tenements.

(ii) Minor interests that must be protected if they are not to be overridden clearly require some entry on the register. In practice this boils down to one of two alternative courses, either a caution or a notice. If such an interest appears in a registered disposition notice will become automatic, though under the Rules an application to make the note should be embodied in the disposition and on the return of the land certificate the solicitor concerned must see that such a note does appear on the register. This note will commonly take the form of a reference to the document filed at the Registry. A notice can in fact be entered on the register of a document that is not a registered disposition, as, for example, a contract for sale, but in this case a certified copy must be filed.

Once the notice has been entered on the register this interest will bind the registered title until such time as it is withdrawn. If it is contained in a registered disposition no difficulty about its entry on the register is presented since, in any event, the land certificate must be lodged at the Registry. If it is contained in an instrument other than a registered disposition it will be necessary not only to produce a certified copy but also the land certificate.

A caution does not indicate in any form the nature of the interest protected. It is not necessary to produce the document creating the interest or the land certificate, because, as has been pointed out, it is

essentially a proceeding hostile to the registered proprietor. It differs from a notice, however, primarily in this: it is a temporary protection. If the registered proprietor wishes to make a disposition the cautioner will be warned and it then rests with him to prove that the disposition should not be made or, if made, must remain subject to the interest protected when a notice would no doubt have to be noted. Such a procedure is much more complicated really than that of notice save in simple cases where a temporary protection only is required or alternatively the procedure is really hostile and the registered proprietor refuses to lodge his land certificate. Even for temporary protection not much, if anything, is usually gained owing to the very simple procedure for withdrawing a notice where a disposition is to be made free from the interest protected by notice.

However, most minor interests that cannot be overridden, such as restrictive covenants, really are intended to bind the land. In such circumstances a notice is the proper method of protection. If the interest is to be created at the same time as a registered disposition it is clearly desirable to include it in such disposition. The practice of the Registry now appears to be to make a fairly full note of such interests in the notice. If there is any doubt about the exact terms of the interest an office copy of the filed document can readily and inexpensively be obtained. Consequently, in connection with these forms of interest it is difficult to see what advantage can be gained by not incorporating them in the registered disposition.

(iii) Minor interests that will be overridden really fall into the category of those equitable interests which in unregistered conveyancing were kept as far as possible off the title. The Land Registration Act, 1925, s. 74, has made statutory this principle by providing that the Registrar shall not be concerned with trusts. Since the Registrar is not concerned it is logical that a purchaser from a registered proprietor should not be and he is not. To this there is one major exception, namely, charitable trusts (L. R. R. 122), for which special formalities are required. Therefore, so far as registered dispositions are concerned it is usually a matter of protecting persons interested in such minor interests from unwarranted dispositions. If minor interests of this character are included in a registered disposition the Registrar may refuse to accept it and consequently it is only in a limited number of cases that such interests should be mentioned. Two considerations, therefore, primarily arise in determining what, if any, mention of such interests should be made in a registered disposition: (a) what form of protection to be noted on the register should be applied for; (b) what reference, if any, should be made to the content of the minor interest.

(a) If the minor interest falls under the head of settled land, the procedure is clearly laid down, which incidentally provides that a copy of the trust instrument *may* be filed at the Registry. If the minor interest is created by way of trust for sale the procedure is not equally clearly defined, but its general principle is easily understood. In both cases it is a question primarily of application to register a restriction. If the interest comes into operation at the date of a transfer of the

registered title, then clearly it is most convenient to apply for the restriction by incorporation in the disposition. If the minor interest does not fall within either of these principal categories it then becomes a problem of the correct form of protection. Although the Registry do use various forms of restriction, *e.g.*, on the registration of a limited company as registered proprietor, in practice restriction could not usually be employed: see L. R. Act, s. 58. Probably notice would not be appropriate, because the rules limit the cases for notice and a notice cannot be registered to protect beneficial interests under a trust for sale or settlement except pending the appointment of trustees: L. R. Act, s. 49 (2). If, therefore, the parties and the Registrar cannot agree upon an appropriate restriction the owner of the minor interest can only rely upon a caution. If there is to be a caution only this is a clear case in which the interest should be created by a separate document and not by a registered disposition.

(b) The restriction is a matter for the register, and must, therefore, appear in the instrument filed at the Registry. The minor interest on which it is based need not and in most cases probably must not be included in the disposition. The Registrar is not concerned with the minor interest. That is the principle. The practice is, perhaps, not quite so adamantinely simple. One of the peculiarities of registered conveyancing is the relative simplicity of some transactions which are dependent upon the withdrawal of a restriction. For example, if there are two partners registered subject to the restriction concerning payment to two registered proprietors and one dies leaving his share in the business to the other it is only necessary for the purposes of title to withdraw the restriction. A purchaser will not go behind the register. On the other hand an application by the sole surviving partner to withdraw the restriction would not satisfy the Registrar without further evidence. Consequently, it is convenient at the date of the transfer to the partners to express them to be interested as such. An application by the survivor and the personal representatives of the deceased partner would apparently be all that is necessary. No assent would appear to be necessary. It is in certain circumstances such as these that minor interests may conveniently be incorporated in registered dispositions. The number of cases is not large because in any event the Registrar could not accept such dispositions for registration. Where it can be done, it may be convenient in many ways and there is no question of a purchaser being in any circumstances concerned. Equally the danger of it being overlooked is small. It would not arise as between vendor and purchaser and as between the registered proprietor and the person interested there would be little question of either party forgetting the existence of any such obligations.

In connection with these interests, however, reference may also be made to the problem of recitals. Registered conveyancing is based on the assumption that recitals are unnecessary. Actually they are used in registered conveyancing and the Registrar does not refuse to accept dispositions containing them. The point, of course, is that recitals of title to the legal estate are almost always unnecessary. Recitals may be

convenient with regard to overriding interests or to minor interests. It can be argued that where recitals are necessary, or desirable, there should be two instruments, one without recitals for registration and another not intended for registration. We are of opinion that this is unsound and generally arises from the curious view that an instrument filed is lost from view. It can, of course, be inspected at any time on authority to search and office copies can be obtained. On the other hand, a document which deals with an interest capable of registration, but is not registered, may easily be overlooked when dealing with a registered title of which the principal document is after all the land certificate, and at the same time it creates no legal interest until registration, and as a minor interest the interest thereby created can apparently be overridden by any registered disposition for value.

(iv) Collateral interests are of all the most tempting form of rights to treat as unaffected by the Land Registration Act. To a certain extent this is true. The purpose of the Land Registration Act was essentially directed to providing a title to registrable interests and to registered charges. Certain other interests inevitably affect the enjoyment of the land and these are largely classed as overriding interests. A small number of equitable interests also affect the enjoyment of the land, such as restrictive covenants, and their existence is protected properly by notice on the register. Other interests may affect the capacity for disposition of the registered proprietor, such as settlements under the Settled Land Act or trust for sale, and these are protected by restriction. These matters do not, however, exhaust the possibilities of transactions affecting land and we have for convenience called them collateral.

A very good illustration of collateral transactions is that of positive covenants affecting freeholds. It has been held that the burden of a positive covenant does not run with registered land: *Cator* v. *Newton*, [1940] 1 K. B. 415. It may, therefore, be said that such covenants should not appear in registered dispositions. This proposition should be examined rather more carefully. First, although the burden does not run the benefit will run, if (i) it affects the nature, quality or value of the estate (*Congleton* v. *Pattison*, 10 East, at p. 158); (ii) it is entered into with the legal owner of the land to which it relates (Co. Lit. 385a; *Webb* v. *Russell*, 3 T. R. 393); and (iii) it is intended to enure for the benefit of the covenantee and his assigns (*Lougher* v. *Williams*, 3 Lev. 92); but a covenant is now deemed to be made with a covenantee and his successors in title: Law of Property Act, 1925, s. 78. Secondly, the original covenantor may remain liable, although he has transferred his estate: *Cator* v. *Newton* (*supra*). Thirdly, in the most important class of positive covenants, namely, those created in connection with freehold rentcharges, the covenants are frequently enforceable against transferees indirectly by the method of creating a right of entry for breach of covenant.

As these covenants are usually created on a disposition of the registrable interest there is *prima facie* no particular reason why they should not be incorporated in the registered disposition except for the common practice of the Registry not to note positive covenants on the

register. Where, however, there are a number of restrictive covenants combined with the positive covenants the register frequently includes both.

The practice of the Registry, though conformable to theory, is inconvenient because it is usual in unregistered conveyancing and proper in registered conveyancing for a transferor under liability to perform the covenants to take an indemnity from the transferee. If no note is kept on the register and a copy of the transfer creating the positive covenants is not kept the desirability of incorporating this indemnity covenant may be overlooked with disastrous results to the transferor: see *Cator* v. *Newton* (*supra*). Nevertheless it is difficult to see what advantage is obtained by the covenants being contained in a separate document. An office copy of the transfer would almost certainly be an advantage.

The position of a right of entry relating to freeholds is by no means clear under the Land Registration Act, 1925 (see III K. & E. pp. 156—157), but assuming that it is not an overriding interest it would require protection on the register to avoid being overridden by a transfer for value. In view of this uncertainty it certainly seems advantageous to apply to have the right of entry noted on the register. If this is done there is no conceivable reason for it being created otherwise than in a registered disposition, and where it is created in respect of a legal rentcharge this will become inevitable, because in fact a legal rentcharge is a registrable interest: see L. R. R. 108.

The effect of these observations results really in this: Collateral transactions, if they affect the title to the registered land, will ultimately find their way to the register in most cases. Moreover, they will appear, perhaps in an indirect form, on the register. There appears to be every reason for incorporating them into a registered disposition, since this will almost certainly avoid the dangerous possibility that otherwise proper application for their protection will be overlooked.

These remarks do not apply with the same force where the collateral transaction relates to overriding interests. If the overriding interest is not noted on the register at all it may be argued that it is a complication to refer to it in a registered disposition, *e.g.*, by way of release. This argument would have more force if the provisions of the Land Registration Act concerning deducing title to overriding interests were habitually observed. The writer may have been unfortunate, but in his experience the contrary is usually the case and a purchaser is left to pursue his investigations on an extract of any note contained on the register. This really illustrates that from the practitioner's point of view it is desirable that all the title to all the interests should so far as possible be maintained under one head, which consequently must be the register, and not two heads.

If an overriding interest has been created by a document that has not been noted on the register (and this will not include a document prior to the date of first registration creating an easement, right or privilege because this will be noted: L. R. Act, s. 70 (2)) it may be convenient to deal with any release by way of unregistered disposition. So to create an overriding interest may be dangerous, because it may not have the

desired effect (see III K. & E. p. 59), and since the easement, etc., not so created may be only a minor interest it is no doubt better to keep it out of any registered disposition. To this point of view may be added the pious hope that the transferor's solicitors may not omit to provide a proper abstract in accordance with the Act.

When all these matters have been analysed we reach a perhaps not unexpected result and this will appear more clearly in the light of comparison. The Land Registration Act may be compared with the Settled Land Act. Both provide a statutory simplified title. Both are designed to keep the legal title free of all equities that do not directly affect the capacity of disposition. It would be possible by judicious clauses in the settlement combined with section 16 of the Settled Land Act to keep all matters off the legal title unless and until it is necessary to enforce them. The doctrine of equitable notice is by section 110 of the Settled Land Act reduced to a minimum and by the Land Registration Act virtually abolished. Nevertheless, it is not the practice in settled land to put all collateral transactions behind this curtain of the simple vesting deed, nor is it customary to attempt to keep the unregistered equivalent of overriding interests on a separate title. In fact in settled land the suggestion that all such interests should be kept separate is not only preposterous but impossible.

In settled land the draftsman keeps clearly in his mind that any powers which are to be exercised in respect of the legal estate should normally appear as additional powers in the vesting deed, and that the use of section 16 of the Act is really limited to these interests which cannot subsist as legal interests, such as powers of appointment. All equities that are intended and can subsist against the land independent of the individual estate ownership will be created as effectively as possible to appear on the title by registration under the Land Charges Act or otherwise. The spectre of equitable notice being laid to a large extent by section 110 of the Settled Land Act, the draftsman is at liberty to bend his energies upon putting on to the legal title those interests, rights and powers which concern the legal estate and the land itself and upon confining the provisions of the trust instrument primarily to those interests which are intended to continue as interests in a trust fund whether or not it is composed of land.

This analogy is very instructive because the Land Registration Act both goes further and requires more than the Settled Land Act. The vesting instrument is replaced to a large extent by the register itself and trusts will not appear on it. The entries on the register will in most respects be simpler than the contents of a vesting deed and the Land Charges Act does not apply, but whereas under the Settled Land Act collateral legal rights and privileges and equities may adhere to the legal estate without direct incorporation into the vesting interest the same is not true of the register. Complete effectiveness for all interests, rights and privileges, other than for *some* overriding interests, is dependent on their relation to the register. It is not enough to draft an instrument to create them; it is also necessary to consider the appropriate form by which they can be enforceable against the registered land. In other

words it is to reverse the process of ordinary conveyancing. It is to consider how notice must be given and not merely whether or not it is given.

With minor interests that require protection because they will be overreached in any event on a transfer, it is obvious that this question of adequate protection is of importance, but generally speaking no question does arise in the technique of conveyancing, because it is simply a matter for the proper form of restriction. In all other matters it is more difficult. There are three methods: (i) attempt to make all such collateral matters overriding interests and trust that it is unnecessary to incorporate them in a registered disposition; (ii) attempt to get such matters noted on the register either as overriding interests or in the charges register by incorporation in a registered disposition; (iii) create such collateral transactions as minor interests independently of a registered disposition and protect them, if at all, by caution or by notice. If notice is used no real advantage is gained by excluding them from a registered disposition, so that ultimately it resolves itself into protection by caution.

Of these three methods the first is obviously the worst, and in many cases would prove impossible owing to the relatively narrow limits of overriding interests as defined by section 70 of the Act. It also relies on an interpretation of the Act which is doubtful, and which, therefore, no good conveyancer should do if it can be avoided.

The last is that which has attracted a large number of practitioners in the past. This, as we have pointed out, is partly a legacy of conveyancing under the Land Transfer Acts, 1874—1897. It depends for its efficiency upon two essentials: (i) the effectiveness of procedure by caution, and (ii) that all documents relating to collateral transactions shall be treated not only by the lawyer, but also by the layman, as part of his documents of title. Of the nature of the procedure by caution we have said enough. It is very cumbersome because it was not designed to give effect to routine transactions; it was meant for the exceptional case of a hostile claim. If the interest has ultimately to be registered in some form or another nothing is gained and a certain amount of time and money is wasted. In the case of a purely temporary transaction something is to be gained by not encumbering a registered disposition with its provisions: in such a case a more straightforward method is the use of a notice which can be withdrawn when its purpose is served.

On the other hand, personal experience of the lay client does not lead us to place any faith in the likelihood of his treating collateral documents as being of the same importance with the land certificate. He may keep all the documents together, but then again he may not. Failure to do so may well cause vexation, delay or even worse, particularly where money has been lent upon the security of a deposited land certificate. If the collateral transaction is contained in a registered disposition an office copy is always available, and the necessity for obtaining one *ad hoc* can always be overcome by obtaining one and putting it with the land certificate, if the client is to be relied upon to keep it.

The second course is that which finally appears to fit into the effective

scheme for registered land. If an overriding interest is noted upon the register there may be some doubt of its extent but none of its existence, and there will be no difficulty in obtaining evidence of the title, because it will be filed. Since such a disposition to be registered must comply with the rules for registered land there will similarly be no doubt of the extent of the dominant and servient tenements unless that doubt is created by inadequate drafting of the parcels in the document creating it. It seems probable that the benefit of the compensation clauses would be obtained by a transferee of the dominant tenement if for any reason the creation of the interest was defective.

For all other transactions the advantage seems to be clearly greater. Because most of them must be protected by some method or another everything is to be gained by making that protection as effective as possible and at the same time to reduce to the minimum the number of interventions of lawyers and officials. If protection is to be by way of notice it is more convenient to incorporate it into any registered disposition than in a separate document. It is cheaper and it is at least as effective and has the further advantage that there is no possibility of it not being lodged with the Registry and application for notice made. There is one other point that is more obscure but not less real. The character of a registered title is not identical with an unregistered title. The definition of the interest is in fact more complete because it is defined by statute. If a transfer or other disposition is made by a registered proprietor, at least as far as registered dispositions are concerned, the effect of that disposition is also defined by statute. This is different in law and in fact from the position of an unregistered conveyance which is determined by a number of rules which leave more to the construction of the document itself. Therefore, it is desirable to relate all collateral transactions to this statutory transaction.

The position may become more apparent if we analyse these generalities in relation to certain transactions of a relatively common nature. Of these the first, and one of the most questionable, is that of charges. Of course, if a charge is to operate otherwise than as a minor interest it must be registered: without registration it is impossible to deal with the legal estate. In the bad old days it was not uncommon to register a prescribed form and take a charge off the register. Now it is possible to register a charge in any form and perhaps the commonest method is to draw a registered charge in the form of an ordinary mortgage with a minimum compliance with the Land Registration Act. A further method is to have a relatively simple registered charge with collateral clauses in a further document. As the charge containing subsidiary clauses is attached to the charge certificate it is difficult to see that the last method has anything to recommend it. The method of the ordinary mortgage form represents a natural and conservative approach to the problem which may be justified, if at all, by the plea that the clauses are well understood and familiar. Examined this is not an attractive proposition. The Land Registration Act at all points makes minor alterations in the ordinary law. Well-known clauses used in an unfamiliar setting may have certain disadvantages, because the

new setting may provide uncertainty, despite the rule that implied terms may be modified by express clauses. Furthermore, since these clauses will be implied, apart from registration of a charge containing a contrary provision, use of the ordinary form may operate unfortunately. For example, there is an implied covenant to pay interest, which obviously must be excluded where necessary, as where the mortgagee is a personal representative or an estate owner under the Settled Land Act. This is sometimes achieved in unregistered conveyancing by the mere omission of any covenant to pay. In registered conveyancing this would be fatal to the intentions of the parties. Again, the rules relating both to tacking and consolidation are different in unregistered from registered conveyancing, and this affects mortgages to secure further advances. It follows that the rules relating to the description of the registered land and any clauses which are directly affected by this description require similar attention. The use of parcels in the form of unregistered conveyancing and not directly controlled by the Land Registry parcels is likely to provide disputes.

On the other hand, the prescribed form, even when it contains every possible equivalent clause appropriate to unregistered conveyancing, remains by reason of its implied terms a simpler document than the old form (see Forms II and IV of III K. & E. pp. 518, 521). Since every conveyancer should aim at a maximum of simplicity this is really sufficient reason for using the prescribed form with such additions as the circumstances demand rather than the old form. We suspect that the old form is sometimes used on the assumption that it saves the trouble of detailed knowledge of the Act and Rules, but we hope that we have given sufficient reasons to dispel that illusion.

In the case of overriding interests which are created independently of any transfer or lease of the registered interest, clearly less is gained by using a form based on the principles of the prescribed forms. If it is to be registered certain details must be included. The use of the registered descriptions and the application to note on the registers of the dominant and servient tenements can be most conveniently incorporated in a document in similar form to those directly laid down in the Rules, and the whole remains a simpler document (see III K. & E. pp. 495—497). What is said of overriding interests equally applies to leases which, although registrable interests, are not required to be in any prescribed form (see III K. & E. pp. 498—501).

It is, however, considerable variations in registered transfers which practitioners would most likely regard as being inappropriate to the use of prescribed forms. It is, of course, impossible to pursue all the forms given in *Key & Elphinstone*, but we may take a few to illustrate some of our foregoing observations. First, let us consider the subject of transfers to joint proprietors. Here we get one of the best illustrations of the effect of the disappearance of the rules of equitable notice. Joint proprietors will nearly always be registered with some restriction or other; its character varies to some extent, but generally it limits dispositions to those cases in which capital money is paid to not less than two proprietors: L. R. Act, s. 53 (3); L. R. R. 213. This in fact

presumes the continuance of a trust for sale. Now joint proprietors may in fact hold as ordinary tenants in common, or as partners, or as joint tenants beneficially entitled. All these interests operate, under the Property Legislation of 1925, behind a statutory trust for sale in order to preserve them from the prying eye of a possible purchaser. This was the old principle in which conveyances were made often unblushingly to trustees to hold for themselves as beneficially absolutely entitled. Old customs die hard and despite the statutory trusts for sale the practice persists. In registered conveyancing this is quite wrong. A purchaser is concerned only with the restriction if any. On the other hand, the joint proprietors, or the survivor of them, merely wants to get rid of the restriction as conveniently as possible. Therefore the exact nature of the interest taken by the co-proprietors should be clearly stated in the transfer and to this no objection is likely to be taken at the Registry despite the fact that it is in theory a "trust" (cp. Form V, p. 426; Form VI, p. 427; Form VII, p. 428; Form XX, p. 564 in III K. & E.). It has the double advantage that it assists in obtaining the correct form of restriction and in withdrawing it when it has served its purpose (see Form IV, III K. & E. p. 494). Being able to withdraw the restriction may save expense as against having to execute a transfer.

Other collateral transactions that will be found in connection with transfers are such matters as the creation and protection of and release of covenants. These clearly demand entries on the charges register. The release of overriding interests also appear. In these cases the advantage becomes apparent whenever a note of the overriding interest appears on the register. When it does not, it may be true that any subsequent transaction relating to the overriding interest may with advantage be made in an instrument not intended to be registered. For the sake of simplicity this would not be so, and an endorsement on the instrument creating the overriding interest would certainly be as effective as keeping a separate document off the register.

In the writer's opinion, probably the most difficult questions from the point of view of technique lie in the incorporation of covenants. Roughly we may say that covenants include (a) restrictive covenants running with the land enforceable in equity; (b) covenants annexed to a legal rentcharge; (c) positive covenants, usually associated with restrictive covenants, intended to bind the land as far as the law allows; and (d) covenants which are collateral to the land and intended only to be enforceable between the parties. The first and last classes certainly present no serious problem. Restrictive covenants must be registered to be protected. The last should clearly not be registered or incorporated in a registered disposition. So far compulsory registration has not touched areas in which the creation of rentcharges is "common form" as an alternative to purchase for a lump sum. No doubt such an extension would provide grounds for a regular practice of the Registry, but it is suggested that the obvious course would be for the Registry to annex to the land certificate a copy of the registered transfer creating the rentcharge, analogous to the case of a lease or charge. This would remove all doubts about the desirability of incorporating all material

particulars in the transfer. Apart, however, from this practice, clearly the right of entry must appear in the transfer and it seems impossible to dissociate this from all collateral provisions, while the fact that the transfer can be inspected at the Registry and an official copy obtained presents no difficulty to a purchaser. Positive covenants are certainly more difficult. They are not usually entered on the register although the proprietor should always provide for them in any contract for sale and require an indemnity covenant. Where, as is usual, such covenants are associated with restrictive covenants they are usually noted on the register in some form so that difficulty does not arise. Where positive covenants alone are entered into there may, in view of the present practice of the Registry, be good ground for having a separate deed.

We may conclude with a warning. From what has been said it will usually be necessary for the practitioner carefully to examine the land certificate with the draft transfer so soon as the certificate is received from the Registry to ensure that all material entries have been made. In the simplest cases no doubt this will be abundant caution, but it is a habit sedulously to be cultivated in all cases of dealings with registered land.

HAROLD POTTER.

NOTES OF RECENT CASES.

1. *CONVEYANCING AND REAL PROPERTY CASES.*

Hire-purchase agreement—emergency powers—agreement to terminate —leave of Court.—The House of Lords, [1942] 2 All E. R. 282, have reversed the decision of the Court of Appeal in *Smart Bros.* v. *Ross*, [1942] Ch. 158 (noted *ante*, Vol. 6, p. 276). There was an agreement to terminate the contract of hire-purchase and on payment of some consideration to the hirer the letter was to have repossession of the goods. The Court of Appeal (by a majority) held that the surrender amounted to the exercise of a remedy under the agreement and that, therefore, leave of the Court was required, applying the principle in *Bowmakers, Ltd.* v. *Tabor*, [1941] 2 K. B. 1 (noted Vol. 5, p. 303), where the voluntary surrender without consideration was held to be the exercise of a remedy. The House of Lords has now overruled this decision in *Smart Bros.* v. *Ross*, but has left the decision in *Bowmakers, Ltd.* v. *Tabor* distinguished, because they held that in *Smart Bros.* v. *Ross* " no ' remedy ' referred to in the statute was being ' exercised ' either directly or indirectly " (*per* Simon, L.C., at p. 285). Lord Atkin stated the point very succinctly when he said: " The appellants are not seeking any remedy for a default in performance of the hire-purchase agreement, but are accepting performance of the new lawful agreement which displaced it."

The effect of this decision by the House of Lords is likely to be considerable. Where instalments under a hire-purchase agreement are in arrear the letters cannot retake possession of the goods without leave

of the Court even if the hirer voluntarily agrees to terminate his agreement. On the other hand, if the letters and the hirer can agree for valuable consideration that the agreement shall come to an end and the hirer will deliver up the goods, this is valid. Why the mere voluntary termination of the hire-purchase agreement, thus releasing the hirer from further instalments, is not valuable consideration was not explained, but is due no doubt to the fact that under a contract of hire-purchase the hirer can always determine the letting and deliver up the goods, when apparently resumption of possession by the letter must be treated as the "exercise" of a "remedy" if instalments are in arrear. From this consideration it becomes clear that the line is very fine, since valuable consideration need not according to the law of contract be of any substantial value. It should, however, be remarked that the Lord Chancellor, who delivered the principal speech, definitely referred to a *bona fide* arrangement. It is thought that a merely colourable transaction would not be protected and the principle in *Bowmakers, Ltd.* v. *Tabor* (*supra*) would be applied.

Emergency legislation—purchase by mortgagee of equity of redemption—leave of Court.—One of the effects of the decision of the Court of Appeal in *Smart Bros.* v. *Ross*, [1942] Ch. 158, now reversed by the House of Lords, was the decision of Uthwatt, J., in *Sun Life Assurance Society* v. *Relton*, [1942] 2 All E. R. 94, where he held that the leave of the Court was necessary to enable a mortgagee to take possession of certain mortgaged property where the mortgagee had purchased the equity of redemption from the mortgagor. The mortgagor had in fact found himself unable to keep up his mortgage payments and was in difficulties with his rates (the premises being vacant). As a result of negotiations between the mortgagees and the mortgagor the mortgagees agreed to purchase the equity of redemption in the properties which included realty and war insurance policy as collateral security for the sum of £15 and taking over the obligations of the mortgagor in respect of the property. Uthwatt, J., regarded this as a perfectly proper transaction, but on the principles enunciated by the Court of Appeal held that leave of the Court was necessary to take possession.

It would appear that this decision is no longer likely to be followed in view of the decision of the House of Lords in *Smart Bros.* v. *Ross* (noted above).

War damage contribution—not apportionable between vendor and purchaser.—As was pointed out in this journal (Vol. 6, p. 26) the war damage contribution was not made apportionable by the War Damage Act, 1941, and it has been held in *Re Jacobs and Stedman's Contract*, [1942] 2 All E. R. 104, that apart from special contract the contribution is payable by the vendor. Farwell, J., held that Condition 5 (3) (b) of the Law Society's General Conditions did not make the amount apportionable as between the vendor and purchaser. It was argued that

" other outgoings " used in that clause included a war damage contribution. The learned Judge rejected this contention on the ground that " outgoings " did not include a capital payment and war damage contribution is a capital payment.

This case is of some general importance, therefore, upon the meaning of " outgoings " as used in this clause. Instalments of a capital expenditure are not " outgoings ".

(1 K. & E., p. 337, n. (*o*).)

Emergency legislation—assignees of equity of redemption—not entitled to relief.—Re Leicester Temperance, etc., Building Society's Application, [1942] 1 All E. R. 580 (noted Vol. 6, p. 285) has now gone before the Court of Appeal and the decision of Morton, J., has in substance been affirmed. An assignee of an equity of redemption is not a person " liable to pay the debt or to perform the obligation " and is not, therefore, entitled to relief under the Courts (Emergency Powers) Act, 1939. The Master of the Rolls (who delivered the judgment of the Court) expressed the opinion that the matter was one of *casus omissus* in the Act, but that it was a matter for the Legislature.

It should be noticed that though the cases referred to in the note already mentioned were cited in argument the Court confined itself to the particular question in issue. The Master of the Rolls also pointed out that although Morton, J., had directed the assignees to be joined as parties to the application this was not necessary since they were not entitled to relief. The problems to which these decisions have given rise cannot be considered as solved and it is to be hoped that legislation may put right what is obviously defective in the present Act.

Vendor and purchaser—sale with vacant possession—requisitioning notice served prior to completion.—Cook v. *Taylor*, [1942] 2 All E. R. 85, adds a new clause to contracts for sale in war-time, namely, a clause that the property is sold with vacant possession " but subject to any requisitioning notice that may hereafter be served or any requisition that may be made by any authority entitled to requisition the property ".

In *Cook* v. *Taylor* (*supra*) the property was sold subject to the Law Society's General Conditions of Sale and no tenancies were specified in respect of the property. In fact the requisitioning notice was served and the keys handed over to the authority after the date of the contract and prior to the date of completion. Simonds, J., held that there was a contract for sale with vacant possession, that handing over the keys precluded the vendor from delivering vacant possession to the purchaser and that the purchaser was entitled to a declaration that the purchaser was entitled to a discharge from the contract and to recover his deposit. The learned Judge distinguished *Re Winslow Hall Estates Co.*, [1941] Ch. 513, because that case was decided on its special facts and possession

had not been taken by the requisitioning authority prior to the date at which the vendor was ready to complete. Since the regulation for requisition of land requires the requisitioning authority "to take possession" for the requisition to be completed, it would appear that no form of notice of requisition would be sufficient to apply *Cook* v. *Taylor* unless possession was actually taken.

(1 K. & E., p. 328, n. (*j*).)

Accommodation railway crossing—duty of railway company.—A negligence case of some importance in country districts may be noted. In *Knight* v. *Great Western Ry.*, [1942] 2 All E. R. 286, cattle were injured by a railway train while crossing from one field of the plaintiff's to another over an accommodation crossing provided for under the Railways Clauses Consolidation Act, 1845, s. 68. The accident occurred in the early morning when there was a mist. The engine driver did whistle as required by a notice board, but the whistle was not heard, and in any event would not have been effective as the engine was travelling at thirty miles per hour. The nearest signal could not be observed by the drivers of the cattle owing to the mist. Tucker, J., held that he could only hold the company liable, if he held that it was negligence in the driver to drive at a pace at which he could not pull up within the range of his vision, and he, therefore, held that the company was not liable. The learned Judge made the following very important observation (at p. 288): "Now, I think there is a duty cast upon the railway company to take reasonable precautions in regard to the approach of their trains to a crossing of this kind. I am satisfied, however, that the nature of the precautions and the degree of care which is required may vary very considerably according to whether the crossing which is approached is one over which the public have a right to go or whether it is merely a private accommodation crossing for the use of the adjoining occupier; but I think the difference is merely a difference in the degree of care which is required in the particular circumstances. I do not accept the contention of counsel for the defendants that the defendants' only obligation is to refrain from doing something which would in effect amount to obstructing the plaintiff's right of way across this crossing. I think there is a greater duty than that."

In the light of these observations every case must be one that is rather a question of fact whether the duty of care is fulfilled by the railway, but the learned Judge did offer one further observation that is of general application. He said: "I do not think that it is right to apply the same kind of tests as one would apply to the driver of a vehicle on a highway in regard to speed in conditions of fog." In effect the burden of care to see that there is no danger from oncoming traffic appears to fall more heavily upon users of a private accommodation crossing than in the case of an ordinary level crossing.

Appointment — revocation by inconsistent provisions in another document.—Re Butler's Settlement, [1942] 2 All E. R. 191, raised an interesting short point on the relation between appointment and revocation under a power of appointment. By her will the donee of a power appointed property in favour of the objects. Subsequently, the donee executed a deed of appointment which was, in accordance with the terms of the power, expressed to be revocable by deed or will. She subsequently died without having altered the will, of which probate was duly granted. Bennett, J., held that the will did not amount to revocation of the provisions of the deed of appointment. The essential principle was laid down in *Re Thoresby's Settlement*, [1910] 2 Ch. 181, namely, a power to appoint is not a power to revoke and, therefore, *prima facie* an exercise of a power of appointment is not an exercise of a power of revocation; as it was put in *Re Wells*, 42 Ch. D. 646, "an instrument which exercises a power of revocation and new appointment must show, not merely an intention to appoint, but an intention to revoke the subsisting appointment". Therefore, although the will spoke from death and became effective after the date of the deed it did not without an expression of intention to revoke the appointment by deed operate to do so. As the will was made prior to the deed, Bennett, J., had no difficulty in holding that the will could not be construed to include such an intention to revoke.

(1 K. & E., p. 95.)

Officer reported missing—evidence of death for purposes of administration.—In *Re Butler* (*supra*) another short point arose because a beneficiary was a pilot officer who was certified by the Air Ministry as missing presumed dead. Bennett, J., held that this certificate was insufficient for him to make an order for the distribution of the income on the footing that the beneficiary was dead, and the question had to stand over for further evidence.

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2. *WILL CASES.*

Option to purchase—no rule that option is personal.—In *Skelton* v. *Younghouse*, [1942] 1 All E. R. 650, the House of Lords unanimously affirmed the decision of the Court of Appeal in *Re Sykes*, [1940] 4 All E. R. 122 (noted *ante*, Vol. 5, p. 151). The case is of importance because it decides definitely that the statement in *Jarman on Wills* (7th ed.), p. 73, that "an option of purchase given by will to A B is *prima facie* personal to him and does not pass to his executors on his death" is wrong. There is no such rule and it is a question of construction in each case whether or not the option of purchase is personal to the beneficiary. On the facts of the case, which were that a son, nominee shareholder for the testator, was given an option to purchase the shares or "any part thereof" and the testator expressed a desire that

the son should have an " opportunity " of becoming absolute owner, the House of Lords agreed with the Court of Appeal that the option was in fact personal and was not transmissible by the son to trustees of a settlement.

The case has one other significance, namely, to emphasise the importance in drafting any clause containing an option. If the option to purchase is intended to be personal this should be clearly expressed so to be; equally, if it is intended that the option is to be assignable this should be stated.

(2 K. & E., p. 914 n. (*t*).)

Commorientes—evidence of presumption of death.—By the Law of Property Act, 1925, s. 184, it is provided that " subject to any order of the Court ", where two or more persons die in certain circumstances rendering it uncertain which of them survived the other or others, for the purposes of title to property the deaths shall be presumed to have occurred in order of seniority. In *Re Lindop*, [1942] 2 All E. R. 46, a husband and wife were both presumed to have been killed by a bomb which destroyed their house. No one saw them die nor knew exactly what they were doing at the time the bomb was dropped though there was evidence that they usually slept in the same bedroom and the explosion occurred during the night-time. Bennett, J., held that the presumption of death by seniority was rebuttable by evidence, that the onus of proof of rebuttal of the statutory presumption lay on the person asserting it, and that in the particular case there was no evidence to displace the presumption. Obviously the case does no more than emphasise that the words " subject to any order of the Court " entitle the Court to hear any evidence and decide whether the statutory presumption is to be displaced.

(2 K. & E., p. 1020, n. (*z*).)

All moneys of which I die possessed—home-made will—property passing.—*Re Morgan*, [1942] 2 All E. R. 30, is important because it contains an authoritative statement on the effect, even in a home-made will, of a gift of " money ". The Court of Appeal (the judgment of which was delivered by Lord Greene, M.R.) has, as it were, finally pronounced that there must be some definite context to enable the word " money " to be construed other than in the strict sense and not so as to include investments of money. The Court also expressed the view that the construction forced upon them by the line of authority was open to review in the House of Lords and that in the changed social conditions since the rule was first propounded it was desirable that it should be overruled. It is significant that leave was given to appeal to the House of Lords.

It should be noted that the gift of " all moneys of which I die possessed " was not the sole bequest in the will. There was a pecuniary

legacy and a specific devise. Furthermore, the personal estate of the deceased was considerable and the bequest in question was to be shared between a number of people while the actual money was not large in proportion to the estate as a whole.

(2 K. & E., p. 819, n. (*o*).)

Executors—retainer—debt due to executor as trustee.—Re Rudd, [1942] 2 All E. R. 206, decides an important point on retainer under the Administration of Estates Act, 1925, s. 34 (2), namely, that retainer can under the present law only be exercised where the executor is entitled to the debt beneficially and not where he is entitled, for example, as trustee. The present case arose out of a debt due to the personal representatives and a third party as trustees of a settlement under which the personal representatives were not beneficially entitled. Morton, J., first held upon the authority of *Re Hubback* (1885), 29 Ch. D. 934, that the right to claim the money was a right of retainer and not a right of preference. He then went on to hold that the context of section 34 (2) required the words "in his own right" to be construed as meaning "beneficially", notwithstanding that in certain cases apart from the Act, and in particular in *Sutton* v. *English and Colonial Produce Co.*, [1902] 2 Ch. 502, the words have been differently construed. This change in the law against the retainer must be contrasted with the change made in its favour by its extension to equitable assets.

Inheritance (Family Provision) Act, 1938—application by husband—small estate.—Re Styler, [1942] 2 All E. R. 201, is worthy of note because of the observations of the learned Judge (Morton, J.) upon the subject of applications by husbands and concerning small estates. Every application to the Court to direct that the provisions of a will should be varied must depend upon its precise facts, but there is a gathering line of authority (see some cases collected in Vol. 6, p. 317) that shows the attitude of the Court, they can do little more.

In this case the husband applied for some grant out of his second wife's estate, which had been left entirely to her daughter by her first marriage. The husband had married his second wife late in life and at her request had given up his business. The parties had only been married a few years. The husband was at the time of application employed on war work of a character which was very heavy for a man over sixty and would not be likely to continue for many years; the occupation which he had given up was much lighter but not available in war-time. The present income of the husband was adequate and the total estate was under £1,200. Morton, J., refused the application, but the case is of importance only for the observations which it contains.

First, the learned Judge expressed the opinion that he would not, in the light of greater experience, probably have granted the application in *Re Pointer*, [1941] Ch. 60 (noted Vol. 5, p. 317).

Secondly, he concurred in the observations of Farwell, J., in *Re Sylvester*, [1941] Ch. 87 (noted Vol. 5, p. 318), that in the ordinary way applications by husbands would not be readily entertained, because *prima facie* a husband should maintain himself.

Thirdly, the learned Judge concurred in the observations of Bennett, J., in *Re Brounbridge* (1942), 193 L. T. Jo. 185, that the Act did not throw upon the testator a duty to make provision for his dependants and the Court could only interfere if the dispositions were unwarranted. The learned Judge observed: "I do not think the Court should interfere with a testatrix's or testator's dispositions merely because the Judge may think that he would have been inclined, if he were in the position of the testator or testatrix, to make some provision for a particular person."

Fourthly, he expressed the opinion that he ought to take into account that the testatrix had derived substantially the whole of her property from her first husband and might think it right to give her property directly to the daughter of her first husband rather than to give an interest in it to her second husband.

Fifthly, the small estate consisted almost entirely of two houses. Although there was under the Act power to make provision out of capital, the learned Judge did not think that this was an appropriate case since it would involve a mortgage.

Sixthly, he did not think that applications in the case of small estates are to be encouraged, though in a proper case he would not hesitate to make an order.

It must be emphasised that these observations must only be regarded as pointers to the attitude of the Court to such applications. In the fairly frequent cases in which practitioners are asked to advise whether the provisions of the Act should be invoked the whole of the circumstances must be considered, but it is thought that the third point should, in particular, always be borne in mind.

(2 K. & E., p. 886, n. (*y*); p. 1016, n. (*s*).)

Secret trusts—to hold upon trusts of existing declaration "or any substitution therefor or modification thereof".—Re Jones, [1942] 1 All E. R. 642; 111 L. J. Ch. 193, carries the problem of secret trusts created by will one stage further (see note to Form 15, Vol. 5, p. 384). The testator bequeathed a considerable sum to his executors to hold upon the trusts of an existing document sufficiently referred to in his will "or any substitution therefor or modification thereof or addition thereto which I may hereafter execute". The obvious intention of the testator was that the sums should be held upon the trusts which at the date of the testator's death he had declared in respect of other donations to the charity to be benefited. In fact, at his death he had executed no other trust instrument. Simonds, J., held that the trust was void for uncertainty. Following *University College of North Wales* v. *Taylor*, [1908] P. 140, he held that the reference to other documents to come into exist-

ence subsequently to the will prevented the existing document from being proved as part of the will, and following *Re Keen*, [1937] Ch. 236, that the attempt to provide for further trusts not contained in a will was invalid in view of the Wills Act, 1837, s. 9.

The learned Judge summed up his reasons for holding that the trust was invalid as follows: "(i) because evidence cannot be admitted to establish only the first but not the second of two alternatives which together are the expression of the testamentary intention; (ii) because, if evidence is admitted to establish the first but not the second alternative, the expression of the testator's intention as a whole cannot be ascertained, and the gift must fail for uncertainty; (iii) because it is not permissible to make a gift in a form which involves power to change a testamentary disposition by an unexecuted codicil."

From the report it does not appear to have been argued that the will only attempted to make the secret trusts those which in fact were in operation at his death. It is thought that if a donor to a charity anticipates changes in the trusts of the charity prior to his death there is no objection to giving property to trustees to be held on the trusts which for the time being at his death are subsisting in respect of any charitable fund. All that would be necessary here would be to insure that no doubt could subsist concerning the particular trusts. This is not preserving to the testator the power to make an unexecuted codicil.

In practice, however, most "secret" trusts are directed in favour of non-charitable objects. *Re Jones* (*supra*) reinforces the point made in the note in Vol. 5 referred to above that it is desirable, if possible, to avoid all reference to any existing document. To refer to a document in such a way that it may come into existence is fatal, at least if the property is given to the legatees upon trust, and it is difficult to see how it could be referred to without having that effect.

Dependant relative revocation—later will containing blanks in the dispositive clause.—In bonis Brown, [1942] 2 All E. R. 176, can be shortly noted as an unusual case. In his second will the testator had inserted a clause revoking all prior wills, but in the main dispositive clause the names of the beneficiaries had not been included. On the special facts, Langton, J., held that the revocation clause had been inserted conditionally on the second will operating as a disposition of the whole of the testator's property, which it did not do. He, therefore, admitted to probate both wills, but excluded the revocation clause in the second will. Obviously this case depends very much on its peculiar facts and it is by no means clear what principle should be deduced, but it is certain that the second will must be incomplete, and it is submitted must be manifestly incomplete on its face, and not, for example, because no reference has been made to any residuary gift.

(2 K. & E., p. 808, n. (*d*).)

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3. *LANDLORD AND TENANT CASES.*

By Lionel A. Blundell, LL.M., Barrister-at-Law.

Removal by landlord of door and window sashes—whether statutory nuisance.—One of the most famous cases in the history of the law of landlord and tenant was *Jones* v. *Foley*, [1891] 1 Q. B. 730, where, the tenant having wrongfully refused to give up possession of his cottage at the end of his tenancy, the landlord had the roof removed. It was held that no action was maintainable by the tenant for the damage thus caused to his furniture. Now the landlord has been deprived of the whole benefit of this decision by the case of *Betts* v. *Penge Urban District Council* (1942), 58 T. L. R. 283, where in like circumstances the landlord, not so bold as in *Jones* v. *Foley*, contented himself with removing merely the front door of the flat and the sashes of one window. This has been held to be a statutory nuisance within section 92 (1) of the Public Health Act, and the landlord fined; thus *Jones* v. *Foley*, though on the particular point unassailed, is for practical purposes demolished.

It is interesting to examine the point of construction on which *Betts' Case* has been decided by the King's Bench Divisional Court. The section requires that the premises shall be "in such a state as to be prejudicial to health or a nuisance". There was no finding here by the justices of any condition prejudicial to health, merely that the landlord's action constituted an interference with the personal comfort of the occupiers of the flat. The Divisional Court, after considering *G. W. Ry. Co.* v. *Bishop* (1872), L. R. 7 Q. B. 550; *Banbury Urban Sanitary Authority* v. *Page* (1881), 8 Q. B. D. 97, and *Bishop Auckland Local Board* v. *Bishop Auckland Iron Co.* (1882), 10 Q. B. D. 138, came to the conclusion that this was a nuisance.

Undoubtedly a nuisance can be constituted by interference with the personal comfort of persons, but the significant point here was that those persons were not the occupiers of neighbouring premises, nor passers-by lawfully making use of the highway, but the occupiers of the very premises themselves upon which the condition arose. This appears to the writer to be an anomalous feature of the case. In the *Bishop Auckland Case*, which was relied on, there was a nuisance to neighbouring occupiers and this, surely, is a generally accepted feature of nuisance in the legal sense, as distinct from the popular sense of the word: see, for example, the definition and cases cited in *Salmond on Torts*, Chap. VII, or *Halsbury's Laws of England*, Vol. 24, pp. 18 *et seq.* It is this aspect of the *Betts Case* which merits consideration, as it seems to open up a very wide construction of the word "nuisance" for the purpose of this class of statutory nuisance.

(Woodfall, pp. 819, 1009.)

Coal—vesting of all coal and mines of coal in the Coal Commission—apportionment of rents and royalties.—Under section 3 of the Coal Act, 1938, the fee simple in all coal and mines of coal vested in the Coal

Commission on July 1, 1942 (called the " vesting date "). Prior to that date they were held as if the existing owners had on January 1, 1939, contracted to sell to the Commission with provision for completion on the vesting date. Rents and royalties under mining leases accordingly fall to be apportioned as at July 1, 1942. It has been held by Bennett, J., in *Coal Commission* v. *Earl Fitzwilliam's Royalties Co.* that this apportionment is to be made under section 2 of the Apportionment Act, 1870, on the basis of time only, and not on the basis of the amount of coal worked.

(Woodfall, p. 889.)

Rent Restrictions Acts—controlled premises let to limited company—how far protected by the Acts.—It has often been stated that the Rent Restrictions Acts have no application to a non-occupying tenant who is not using the premises as his home, and therefore the possession of a limited liability company is not protected. This is amply supported by good authority, and *dicta* may be quoted from *Skinner* v. *Geary*, [1931] 2 K. B. 546; *Haskins* v. *Lewis*, [1931] 2 K. B. 1; *Reidy* v. *Walker*, [1933] 2 K. B. 266, and *Hiller* v. *United Dairies (London), Ltd.*, [1934] 1 K. B. 57. This proposition, however, now needs considerable qualification in view of the recent case of *Carter* v. *S. U. Carburetter Co., Ltd.* (1942), 58 T. L. R. 348.

The Court of Appeal has drawn a distinction between those provisions of the Rent Restrictions Acts which limit the amount of rent recoverable from a tenant, based on section 1 of the Act of 1920, and those provisions which protect a tenant in his occupation after his tenancy has come to an end, based on section 3 of the Act of 1933 and section 15 of the Act of 1920. It is true that all the cases mentioned above, with the exception of the last-named, dealt with the latter question: a non-occupying tenant, such as a limited liability company, claimed a right to hold over as statutory tenant after the contractual tenancy came to an end, and it was held that the Acts gave no such right. Although the judgments were expressed in terms wide enough to extend to the restrictions on recoverable rent based on section 1 of the Act of 1920, this matter was not really before the Court in those cases.

In *Carter* v. *S. U. Carburetter Co., Ltd.*, the Court of Appeal has held that a limited liability company, though not entitled to claim a statutory tenancy when its contractual lease has come to an end, is entitled to the benefit of the limitations on rent fixed by the Rent Restrictions Acts.

This will not, in most cases, materially affect the practical position as between the landlord and his limited liability company tenant because, without the right to stay on after notice to quit, the right to challenge the amount of rent (and so invite notice to quit at the first date legally possible in accordance with the terms of the tenancy) is not of such great value.

(Woodfall, pp. 295, 350.)

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4. *DEATH DUTY CASES.*

By Leonard Stein, Barrister-at-Law.

Succession duty (Ontario)—situs of shares.—According to the well-known test laid down by the Privy Council in *Brassard* v. *Smith*, [1925] A. C. 371, registered or inscribed securities are situated, for death duties purposes, in the place where a transfer can be effectively registered. What is the position where the securities can be effectively transferred on either of two registers kept in different fiscal areas? This was the question raised in *R.* v. *Williams*, [1942] W. N. 111, where the Judicial Committee had to deal with a claim to succession duty under the Ontario Succession Duty Act, which imposes the duty on "all property situate in Ontario . . . passing on the death of any person, whether the deceased was at the time of his death domiciled in Ontario or elsewhere". The deceased was an American citizen who died domiciled in the city of Buffalo, New York. The property in question consisted of shares in a company incorporated in Ontario. The share certificates were physically situate in Buffalo. The deceased had executed transfers in blank. The head office of the company was in Ontario. Transfers could be effected at either of two offices—one in Ontario and the other in Buffalo. The first point decided by the Judicial Committee was that there was nothing in the Ontario Companies Act to prevent the company from maintaining an office in Buffalo where transfers of shares could be registered. It was, therefore, impossible to dispose of the question of *situs* by looking at the place where transfers of the company's shares could be effectively registered, since there were two such places, one of which was in Ontario, while the other was not. It was argued that, in these circumstances, the decisive consideration must be the domicil of the company, or the locality of its head office or of its principal place of business, all of which were in Ontario. But this contention was rejected, and it was held that the principle of *Brassard* v. *Smith*, above, must be applied by inquiring which of the two places where transfers could be registered was the proper place for the registration of a transfer of this particular block of shares. The position was, in fact, that the shares could be sold in Buffalo by the personal representatives of the deceased, that the transfer could be registered there, and that the whole transaction could be carried out, and the shares effectively transferred to a purchaser, without anything being done by anyone in Ontario. On the other hand, registration could not be effected on the Ontario register unless the share certificates were produced in Ontario, and the personal representatives of the deceased could not be compelled to part with them for the purpose of enabling a transfer to be registered in Ontario instead of in Buffalo. The conclusion reached was that in a business sense the place where, at the date of the death, the shares could be effectively dealt with was Buffalo, and on this ground the Judicial Committee, affirming the decision of the Canadian Courts, decided in favour of the taxpayer.

Estate duty—persons killed on war service—by whom benefit of remission to be enjoyed—Finance Act, 1900, *s.* 14; *Death Duties (Killed in War) Act*, 1914, *s.* 1; *Finance Act*, 1918, *s.* 44; *Finance Act*, 1924, *s.* 38.—The remission, or partial remission, of death duties in respect of property passing on the death of a member of the forces on active service is provided for in a series of enactments comprising section 14 of the Finance Act, 1900, the Death Duties (Killed in War) Act, 1914, section 44 of the Finance Act, 1918, and section 38 of the Finance Act, 1924. The property in respect of which the remission, or partial remission, can be claimed under these enactments is property passing on the death to the widow of the deceased or to his lineal descendants, lineal ancestors, brothers, sisters or descendants of brothers or sisters. *Re Joel*, [1942] W. N. 160, was a case in which a naval officer who had died on active service had bequeathed his residuary estate as to two-fifths to his brother, as to another two-fifths to his sister, and as to the remaining fifth to a nephew of his late wife. Holding that the purpose of the relevant enactments was to grant relief from death duties for the benefit of certain relatives of the deceased, Farwell, J., on a summons taken out by the executors, made a declaration which decided in principle that the benefit of the remission should be shared equally by the brother and sister of the deceased, to the exclusion of the other residuary legatee. It will be remembered that the scope of the enactments mentioned above has recently been extended by section 46 of the Finance Act, 1941, which enables similar concessions to be claimed in respect of property passing on the death, during the present war, of a civilian dying from injuries caused by warlike operations.

Estate duty—disclaimer by husband of wife's testamentary gift—Finance Act, 1894, *s.* 5 (2) *and s.* 22 (2) (*a*)—*Finance Act*, 1914, *s.* 14.—The question decided in *Parsons* v. *Att.-Gen.*, [1942] W. N. 126, was, briefly stated, whether a legatee who had disclaimed a gift could be said to have been competent to dispose of it within the definition of that expression in section 22 (2) (a) of the Finance Act, 1894. By her will a testatrix bequeathed £10,000 stock to her husband absolutely, free of death duties, and directed her trustees to stand possessed of her residuary estate upon trust for her husband for life, with remainder to her son. The testatrix died in June, 1937, and estate duty was duly paid on her estate, including the £10,000 stock. In February, 1938, the husband by deed disclaimed the gift of the £10,000 stock. On his death in 1940 his executors contended that no estate duty was payable in respect of the £10,000 stock by reason of section 5 (2) of the Finance Act, 1894, which, as restricted in its operation by section 14 of the Finance Act, 1914, provides, in effect, that where estate duty has been paid in respect of settled property since the date of the settlement on the death of one of the parties to a marriage, it shall not be payable in respect of that property on the death of the other party to that marriage, if that other party was not at the time of his death, and had not been at any time

during the continuance of the settlement, competent to dispose of that property. The question to be decided was, therefore, whether the husband had at any time been competent to dispose of the property. Section 22 (2) (*a*) of the 1894 Act provides that " a person shall be deemed competent to dispose of property if he has such an estate or interest therein or such general power as would, if he were *sui juris*, enable him to dispose of the property . . . ". Farwell, J., held that, notwithstanding that the husband had disclaimed the gift, there had, nevertheless, been a time when he was competent to dispose of the £10,000 stock, and that it made no difference that he had elected to dispose of it by refusing to take it.

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5. *INCOME TAX CASES.*

By Leonard Stein, Barrister-at-Law.

[The decisions selected for notice are not necessarily the most important from the standpoint of the income-tax practitioner, but those most germane to the subjects with which *The Conveyancer* is primarily concerned.]

Surtax — privately controlled companies — definition of investment company—Finance Act, 1936, *s.* 20 (1).—In section 20 of the Finance Act, 1936 (which extends the provisions of the companies surtax legislation in relation to investment companies) sub-section (1) defines an investment company as a company " the income whereof consists mainly of investment income, that is to say, income which, if the company were an individual, would not be earned income as defined in sub-section (3) of section 14 of the Income Tax Act, 1918 ". This definition of an investment company is applicable whenever an investment company is mentioned in the companies surtax legislation—see section 14 (4) of the Finance Act, 1937. *E. P. H. Finance Trust* v. *C. I. R.*, [1942] T. R. 135, turned on the construction of this definition in relation to a company which, after carrying on business since 1912, had gone into liquidation on April 1, 1938. The company had carried on a general financial business, on the profits of which it had been regularly assessed under Case I of Schedule D on the footing that they were the profits of a trade. In 1937, however, there was no profit but a substantial loss, and the same was true of the first quarter of 1938. On the other hand, both in 1937 and in the first quarter of 1938 the company continued to receive income from investments, this income, of course, being taxed at the source and not entering into the Case I computation. By reason of its trading losses the company had, under section 34 of the Income Tax Act, 1918, become entitled to claim repayment of the tax suffered by deduction and had, in fact, received such repayment. It was contended that on these facts it was not open to the Special Commissioners to find that the company was an investment company. The question which the definition in

section 20 (1) of the 1936 Act requires to be answered is whether the income "consists mainly of investment income", and there is clearly some difficulty in attaching a satisfactory meaning to the question whether the income "consists mainly of investment income" at a particular date—in this case April 1, 1938. In practice an answer can only be provided by looking back over a certain tract of time and inquiring whether, during that period, the income has or has not consisted mainly of investment income. The first point decided by Macnaghten, J., was that the period to be taken into account is a matter for the Special Commissioners and must depend on the particular circumstances of the case. So far, therefore, as the question was purely one of fact, the Commissioners' finding could not be interfered with. But the company also raised a point of law, the argument being that in the statutory definition the word "income" must be taken to mean net income and that in this case the company could not be said to have been an investment company on April 1, 1938, since in the period in which the income had not consisted mainly of trading income there had been no income at all, the trading losses having exceeded the income from investments, leaving a net deficiency. This contention was rejected by the learned Judge, who took the view that because the company had had the right to claim repayment of the tax deducted at the source and could, therefore, be said to have had no taxable income, it did not follow that it had no income for the purposes of determining its position under section 20 (1) of the 1936 Act. The definition says nothing about taxable income or net income, and the investment income was none the less income because the company was entitled, for tax purposes, to set off against it a loss on its trading activities. The Special Commissioners were not, therefore, precluded, as a matter of law, from finding that the company was an investment company nor were they bound to look further back than the last fifteen months.

Surtax—"arrangement" constituting a "settlement"—Finance Act, 1938, *s.* 38 (2), *s.* 41 (4) (*b*).—In *The Conveyancer* for June, 1942, reference was made (see pp. 300–1) to *Burston* v. *C. I. R.*, 21 A. T. C. 32, where the main question to be considered was whether a complicated series of transactions, some of which did and some of which did not relate to a settlement in the ordinary sense of the term, together constituted an "arrangement" amounting to a "settlement" within the definition of that expression in section 41 (4) (b) of the Finance Act, 1938. A similar question came before the Court of Appeal, and was likewise decided to the disadvantage of the taxpayer, in *Chamberlain* v. *C. I. R.*, 21 A. T. C. 58. Here, too, the taxpayer had sought to attain his object by combining the formation and manipulation of a peculiarly constituted company with the creation of well-devised trusts of the company's shares. The complicated facts do not, for the present purpose, require detailed description. What is important is the general principle propounded by du Parcq, L.J., who, delivering the judgment of the Court, recalled the observations of Greene, M.R., in *C. I. R.* v.

Payne, 23 T. C. 610, and said that " where things have been done either at one time or over a period of time, with the deliberate intention that, in conjunction, they shall produce a certain result, there is, in our opinion, an 'arrangement' ". The provisions which the Revenue authorities were seeking to apply were those of sub-section (2) of section 38 of the 1938 Act—the sub-section dealing with cases in which some person has power to revoke or otherwise determine the settlement or some provision thereof and, in the event of the exercise of that power, the settlor, or the settlor's wife or husband, will or may become beneficially entitled to the whole or part of the settled property or of the income of that property. It having been decided that the transactions in question constituted an " arrangement " amounting to a settlement, it followed from paragraphs (b) and (c) of section 41 (4) that the person by whom those transactions had been effected was the settlor for the purposes of section 38. What had still to be considered was whether there was " power to revoke or determine the settlement or any provision thereof " within the meaning of section 38 (2). The scheme had been so devised that the settlor had power, by virtue of his voting rights, to cause certain classes of shares to be redeemed and to cause the company to be wound up, and the exercise of that power would or might result in the settlor's wife becoming beneficially entitled to part, at least, of the company's assets. It was held that the redemption of the shares or the winding up of the company, or the two transactions together, amounted to a determination of a " provision " of the " settlement ", and, since the settlor's wife would or might benefit, it followed that the requirements of section 38 (2) were satisfied. The Court gave leave to appeal, and the case may be expected to go further.

Tax-free annuity—will made before September 3, 1939—*testator's death after that date—Finance Act*, 1941, *s.* 25.—Section 25 of the Finance Act, 1941, deals with certain classes of tax-free payments, including, in particular, tax-free annuities. The effect of section 25 (1) is that, where the prescribed conditions are satisfied, any such payment falling due in a year for which the standard rate of income tax is ten shillings is to be made on the footing that the stated amount is reduced by nine twenty-ninths. Two conditions are laid down. First, the provision for the payment must have been made before September 3, 1939. Secondly, it must not have been varied on or after that date. In an article in *The Conveyancer* for June, 1942, it was said to have been held that, in the case of a testamentary annuity, the provision was to be taken to have been made, not on the making of the will, but on its taking effect at the death of the testator. This is what was decided by Farwell, J., in *Re Waring*, [1942] W. N. 107. That decision, however, has now been reversed by the Court of Appeal. The facts of the case are simple. A tax-free annuity was bequeathed by a will made in February, 1939. In March, 1939, the testator made a codicil, which confirmed the will. In January, 1940, he made a second codicil, which

did not, in terms, confirm the will. The second codicil contained nothing relevant to the annuities. In August, 1940, the testator died. The Court of Appeal was unanimous in holding that, just as in the case of a deed a provision is made when the deed is executed and delivered, so in the case of a will it is made when the will is executed and attested, notwithstanding that it does not take effect until the testator's death. The second codicil, made in January, 1940, contained no reference to the annuities, so that there could be no question of the " provision " having been varied after September 3, 1939. On the other hand, this second codicil did not, in terms, confirm the will, so that it was hopeless to contend that the date when the provision was made was the date of the codicil. The Master of the Rolls reserved his opinion as to how section 25 (1) would apply in the case of a tax-free annuity payable under a will made before September 3, 1939, and confirmed by a codicil made after that date. The decision is reported in [1942] W. N. 163.

Tax-free annuity under deed of separation — deed made before September 3, 1939—whether varied by subsequent agreement made after that date—Finance Act, 1941, *s.* 25.—As stated in the note on *Re Waring*, above, section 25 (1) of the Finance Act, 1941, requires two conditions to be satisfied in order to bring a tax-free annuity or other tax-free payment within the scope of that section. Provision for the tax-free payment must have been made before September 3, 1939, and, further, the provision must not have been varied since that date. In *Cobbold* v. *Davenport*, [1942] T. R. 161, the provision had been made by a deed of separation executed in 1921, but the question arose whether it had, within the meaning of section 25 (1), been varied by an agreement executed in November, 1939. In the deed of separation the husband entered into certain covenants with the wife and also with the trustees of the deed together with the wife. The deed provided (*inter alia*) that after the death of the husband, survived by the wife, she should receive from his estate during her life an annual sum of such an amount as would, together with the net amount of the income receivable by her under the marriage settlement and the net amount of the income (if any) receivable by her under the husband's will, leave her with a clear yearly income of £4,500 after payment of surtax. The husband died in 1929. No income became payable to the widow under his will, but she became entitled to a net income of £1,400 under the marriage settlement, which required a fund to be set aside for the purpose of providing that income. It was, however, agreed by a deed of family arrangement that no such trust fund should be created and that the widow should be paid monthly sums of such amount as would leave her, after payment of surtax, with a clear annual income of £4,500. After September 3, 1939, *viz.* on November 30, 1939, this arrangement was varied to the extent that, having regard to the recent increases in the rates of tax, the widow agreed to accept reduced payments during the period of the war. The question before the Court was whether, on these facts, the provision made in the 1921

separation deed for the payment of a tax-free annual sum had been varied since September 3, 1939, so as to make section 25 of the Finance Act, 1941, inapplicable, with the result that notwithstanding the enactment of that section, the tax-free payments provided for by the 1921 deed remained payable in full. Farwell, J., answered this question in the negative. The trustees of the separation deed were not parties to the deed of November 30, 1939, nor did that deed in terms affect the separation deed at all. On these grounds the learned Judge held that there had been no such variation of the provision contained in the separation deed as to exclude the application of section 25.

Settlement — annual payments — power to revoke or determine — Finance Act, 1938, *s.* 38 (1).—The main point decided in *C. I. R.* v. *Fitte*, [1942] T. R. 137, concerned the construction of the words " revoke or otherwise determine the settlement or any provision thereof " in paragraph (a) of section 38 (1) of the Finance Act, 1938. What that sub-section provides is, as is well known, that if any person has or may have power to revoke or determine a settlement or any provision thereof, and in the event of the exercise of that power the settlor (or the settlor's wife or husband) will or may cease to be liable to make any annual payments payable by virtue or in consequence of any provision of the settlement, then any sums payable by virtue or in consequence of that provision of the settlement shall be treated as the income of the settlor. In *Fitte's Case*, above, the settlor had covenanted by deed to make certain annual payments. Under the trusts declared by the deed, as modified by a supplemental deed, the payments were to be held by trustees for the benefit of such one or more of certain persons as the settlor should appoint, provision being made for the distribution of the income in default of appointment. The persons in whose favour an appointment might be made included all persons employed by any company of which the settlor was or should at any time be a director. In an attempt to invoke section 38 (1) of the 1938 Act, the Revenue authorities contended that the settlor might be employed by a company of which he had been a director; that in that event he would be entitled to direct the trustees to pay the annual sums to himself; and that this would amount to the determination of the provisions of the settlement in favour of all other possible beneficiaries. Macnaghten, J., held that, on the true construction of section 38 (1), that sub-section was inapplicable. He thought it highly questionable (though he did not find it necessary to decide the point) whether an appointment by the settlor in favour of himself would amount to a revocation or determination of any provision of the settlement. But even assuming, for the sake of argument, that it would, it did not follow that the requirements of section 38 (1) were satisfied. The sums which, under the provisions of section 38 (1), are to be treated as the income of the settlor are " any sums payable . . . by virtue or in consequence of *that* provision of the settlement ". Hence, the real question under section 38 (1) is not merely

whether there is power to revoke or determine *any* provision of the settlement, but whether there is power to revoke or determine a provision by virtue or in consequence of which payments are required to be made. If not, there is no sum which is required by the sub-section to be treated as income of the settlor. In *Fitte's Case*, above, such provisions of the settlement (if any) as the settlor had power to determine by making an appointment in favour of himself would not in any case include any provision for the making of payments, and this consideration was held by the learned Judge to be conclusive in favour of the taxpayer.

Income tax—mining lease—subsidence—"easement"—"rent"—Finance Act, 1937, *s.* 21.—The decision in *Earl Fitzwilliam's Collieries* v. *Phillips*, 21 A. T. C. 37 (see *The Conveyancer*, March, 1942, p. 221) has been affirmed by the Court of Appeal, 21 A. T. C. 37.

Annuity—income accrued during annuitant's lifetime paid after his death—repayment claim by personal representatives.—The well-known rule laid down in *C. I. R.* v. *Henderson's Executors*, 16 T. C. 282, is that no repayment of tax can be claimed in respect of such proportion of income received after the death of a person who has died as accrued during his lifetime—see also *Wood* v. *Owen*, [1941] 1 K. B. 92. This rule was applied in *Bryan* v. *Cassin*, [1942] T. R. 145, which related to a testamentary annuity payable to S. during his life. The annuity was payable in quarterly instalments but accrued from day to day. S. died on January 3, 1941. The last quarterly instalment before his death was payable and paid on October 23, 1940. After the death of S. an amount representing the proper proportion of the annuity for the broken period from October 23, 1940, to January 3, 1941, was paid, less tax, to the executors, who then claimed the repayment of tax to which S. would have been entitled if he had received the income in his lifetime. An attempt was made to distinguish *C. I. R.* v. *Henderson's Executors*, above, on the ground that in that case the income in question (which arose from investments forming part of the estate of the deceased) did not become payable until after the death and might have become the income of a legatee, whereas here the annuity ceased on the death of S. Macnaghten, J., held that the distinction was immaterial. The income in question was not paid and did not become payable to S. during his lifetime, and, that being so, it was clear that the case fell within the principle on which *C. I. R.* v. *Henderson's Executors* was decided.